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Project Finance 2020

A practical cross-border insight into project finance

Ninth Edition

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1 Overview

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

In 2020, the UK's exit from the European Union was confirmed by Parliament, following the formation of a decisive Conservative majority in the December 2019 general election. However, a comprehensive trade deal with the European Union has yet to be signed and the prospect of a "No Deal" exit on 1 January 2021 remains. This uncertainty has affected the amount of activity in the country's project finance market. The upcoming transition from LIBOR is also worth noting, for the issues it raises for the project finance market in the UK more generally.

Nevertheless, the Conservative government has recently announced a boost in energy and infrastructure investment, with new projects (such as five new hydrogen schemes located near Aberdeen, Mersey, and near Grimsby) and the revival of old ones, such as the renewed engagement with the HS2 project. Such announcements are consistent with their manifesto promises (published November 2019) of a 'revolution' in infrastructure, if re-elected. The manifesto further confirmed the Party's commitment to projects such as the Northern Powerhouse Rail, flood defences (pledging £4 billion in funding), and investment in roads such as the M4 (pledging £28.8 billion in strategic and local roads).

There has also been external investment into the UK energy and infrastructure market, most recently with the announcement by Japan's Itochu Corp (through its European subsidiary) of its investment in Winch Energy, a UK off-grid renewables developer.

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

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"). As part of the 2019 update to the existing 2018 NIP, the government stated that the current value of UK projects in the 2018 pipeline, relating to the transport, energy, utilities, digital infrastructure and flood and coastal, science and research and social infrastructure sectors, stood at over £600 billion (combined public and private investment) up to 2027/28, of which around £190 billion will be invested by 2020/21 and a further £225 billion invested from 2021. Through these investments and projects, the government aims at increasing living standards, driving economic growth and boosting productivity.

Already, public and private infrastructure investment has gradually increased over the past three decades (since 2010, 4,500 infrastructure projects have been delivered). The two largest sectors, energy (which boasts investment of £51.7 billion from 2018/19 to 2020/21) and transport (£54.9 billion from 2018/19 to 2020/21), account for over half of the infrastructure pipeline's total value.

In the UK, the divide between conventional project finance and the bond and leveraged finance markets continues to narrow. The market saw a continuation of diversification of both sources and types of project-related debt. As with the project bonds market, the trend comes in part from the US, where a growing (from 2016 to date) prevalence of greater infrastructure and energy sponsor focus on Term Loan B structures – used as refinancing tools, or sitting alongside conventional financings and/or less conventional financings (for example, inventory and receivables financings) – is spreading to the European market. Here, commentators are predicting that such a Term Loan B market will see increased use of forward purchase agreements, cash sweeps and power hedges in transactions.

Multilateral and bilateral institutions 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 exit from the European Union, which has, seemingly, buoyed governmental 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 UKEF's Direct Lending Facility, see below).

By way of example:

- the European Investment Bank continues to maintain its Europe 2020 Project Bond Initiative;
- 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
- UK Export Finance's ("UKEF") 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 2020/21 and 2021/22.

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The UK Green Investment Group was launched in October 2012 (at the time, as a non-departmental public body of the Department for Business, Energy & Industrial Strategy ("BEIS"), but it was sold to Macquarie Group Limited in August 2017) and has since committed over £20 billion of financing to 100 green infrastructure projects, committing £3.4 billion to the UK's green economy. From April 2018 to March 2019, for example, the UK Green Investment Group invested and arranged over £2.4 billion globally. This is a significant increase from the £1.6 billion figure reported for the period of August 2017 to August 2018. In practical terms, subsequent to the UK Green Investment Group's acquisition in August 2019 of a 40% stake in East Anglia One, the Green Investment Group has now supported nearly 50% of total UK offshore wind capacity in operation or construction, and their March 2019 Green Impact Report notes that investments during 2018 amounted to the equivalent of removing 165,000 cars from the road. It is the first investment bank worldwide to invest solely in green infrastructure (on 25 September 2019 as part of the commitments made at the United Nations Climate Action Summit, The UK Green Investment Group's intention to develop a 20GW pipeline of new renewable energy projects was announced). The funds have been used to leverage private-sector capital to fund projects in priority sectors from offshore wind to waste and non-domestic energy efficiency, with notable success stories over 2018 and 2019. For example, in December 2018, the UK Green Investment Group's Galloper offshore wind farm (in which it holds a 25% stake) was successfully refinanced to the tune of £1.2 billion. The UK Green Investment Group also had a busy 2019 Q1: in addition to the financial close reached on Rookery South Energy, outlined above, in March 2019 the UK Green Investment Group also announced that it was set to buy Savion, the solar and energy storage unit owned by Tradewind Energy, a subsidiary of Enel Green Power North America (financial close is expected mid-2019). Such robust market activity is a promising sign for the growing strength of UK green energy investment. The UK Green Investment Group additionally, and subsequent to 2019 Q1, contributed to the construction of the first waste-to-energy project in Scotland to supply industrial heat from the new Earls Gate Energy Centre. The UK Green Investment Group has also recently looked beyond the UK for its investments. For example, the acquisition of a 43 MW Swedish onshore wind farm at Hornasmossen (Sweden), and the acquisition of the Group's first projects in Norway and Poland.

UKEF has also shown a significant shift in approach and appetite for international project finance risk. In 2019, UKEF supported its largest ever transaction, providing a £5 billion package to support BAE Systems' and MBDA UK's contract with the government of Qatar. UKEF also provided over £600 million in support for projects in sub-Saharan Africa. UKEF has three additional funding-related facilities: the Direct Lending Scheme; the Export Refinancing Facility; and the Local Currency Finance Scheme. Under the Direct Lending Scheme, UKEF provides export credit loans up to £3 billion (as the fund currently stands, though as explained above, this figure is expected to rise to £5 billion by 2022) in aggregate to overseas buyers to finance the purchase of capital goods and/or services, from exporters carrying on business in the UK. The results for 2018–2019 saw UKEF deploy £587 million in Direct Lending to support UK exports, while making an additional £2 billion in capacity available in 2020–21 and 2021–22.

Loans can be made in sterling, US dollars, euros or Japanese yen. The Export Refinancing Facility is available to banks funding non-sterling buyer credit loans, typically with values above £50 million that are intended to be refinanced through the debt capital markets or other commercial loans. The Export Refinancing Facility aims to boost trade by ensuring that long-term funding is available to overseas buyers of British exports supported by UKEF. UKEF has also introduced a Local Currency Finance Scheme. Under this scheme, UKEF can guarantee a credit loan given to an overseas borrower in a local currency (it supports around 40 different currencies), provided the loan is used to purchase capital goods/services from an exporter operating in the UK. Local Currency Financing is particularly useful for reducing foreign currency risk and variable debt costs where a project does not generate revenues in a foreign currency. As already touched upon, the 2016 Referendum result and the UK's exit from the EU has also precipitated a change in UKEF's work. In addition to increased funds for investment, the way UKEF partners with other institutions has been widened and made more flexible. Whereas previously UKEF would establish a panel of invited lending partners to assist its investments, UKEF now has the freedom to partner with any bank or institution to deliver its direct lending support, provided certain criteria are met.

The Spring Statement (14 March 2019) delivered further arrows to UKEF's bow. A new "General Export Facility" was announced, with the stated aim of allowing a wider range of exporters to access UKEF support. It will allow "UKEF to support exporters' overall working capital requirements, rather than linking support to specific export contracts" (HM Government Press release: New measures to enhance UKEF support for UK exporters announced in Spring Statement). This facility is expected to be launched in 2020.

The energy markets

The UK's energy sector continues to undergo significant change. The 2009 Renewable Energy Directive set a target for the UK to achieve 15% of its energy consumption from renewable sources by 2020. In 2018, 11.0% of final energy consumption was from renewable sources, up from 9.9% in 2017.

To bolster the UK's efforts in achieving this, the Energy Act 2013 implements key aspects of Electricity Market Reform ("EMR") – a policy initiative pioneered by the UK Government to mobilise £110 billion (approximately US$175 billion) of capital investment required by 2020 to ensure a reliable and diverse supply of low-carbon electricity. Such reforms are vital, as the UK has seen significant power plant closures in recent years – the Act was aimed at ensuring both investment in infrastructure, alongside decarbonisation as more power plants are decommissioned in the UK. Around a fifth of capacity that was available in 2011 will close by the end of this decade, and demand for electricity is set to increase as major sectors such as transport and heat are electrified.

The subsequent Energy Act 2016 furthers the 2013 Act's work. It focuses on the oil and gas sector and works to implement recommendations into UK offshore oil and gas recovery and its regulation. The Act formally established the Oil and Gas Authority ("OGA") as an independent regulator and enabled a more comprehensive charging of the offshore oil and gas industry for licences for environmental and decommissioning activity. This allows the government to continue to recover costs of its environmental and decommissioning activity in line with the "polluter pays" principle.

In broader terms, the UK project finance market in the oil and gas sector has not been immune to the effects of global trends. The "new normal" of low commodity prices since 2016, for example, has depressed capital investment in oil and gas projects in the UK. Exploration and production companies are keeping tight budgets, and pressures on margins persist (according to Oil & Gas UK's 2019 Business Outlook). However, there is also cautious optimism in the market. Total production (including both oil and gas production) levels are now at their highest levels

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since 2011 (up 4% in 2018 compared to 2017 and 20% higher than 2014 levels), competition is creating cost savings and, despite tight budgets, exploration is gaining traction – particularly with regard to the UK Continental Shelf. In 2017 and 2018, twelve and five (respectively) new field start-ups were approved, ensuring solid (albeit not spectacular) opportunities for future investment.

The UK's current electricity mix has changed substantially, and rapidly, over the past couple of years. Most notable is an increase in renewable-generated electricity (a trend in line with global patterns). In 2018, 33% of UK electricity generation came from renewable sources. In June 2019, the UK electricity system operated for 18 days without using coal, the longest period since the 1800s. Such achievements were to a substantial extent reliant on the especially windy conditions the UK has experienced over the past year; wind provides the highest percentage (52%) of renewable energy. Biomass fuel (32%) and solar panels (12%) also make a significant contribution to renewable energy generation. In the past 10 years, electricity generated from wind has increased from 1.3% of the total to 18.8%, while coal has dropped from 30.4% to 2.5%.

The UK Government's energy and climate change goals are to deliver secure energy and a sustainable low-carbon future. This is driven by the need, by 2050, for an 80% reduction in carbon emissions (across the economy) as against 1990 levels and, by 2020, to achieve the legally binding EU target of sourcing 15% of the UK's energy from renewable sources (not including nuclear power). To allay fears that this target would be lost on the UK's exit from the EU, in June 2016, the Conservative Government announced the ambitious (but legally binding) target of reducing carbon emissions by 57% by 2030. In 2019, the UK became the first major economy to target net-zero greenhouse gas emissions by 2050. Such targets are informed by the UK's need of developing approximately 59GW new net capacity by 2025, with as much as 33GW coming from renewables and the remaining 26GW coming from conventional thermal power. In an effort to promote private investment in the development of large-scale infrastructure projects (and in particular, the development of low-carbon technology) in the UK, the UK Government has instituted a series of programmes that are specifically designed to stabilise the economics of financing for such projects.

The UK Government has, however, continued investment in new nuclear, and displayed a firm commitment to the role it should play in the UK's future energy mix. In Q2 of 2018, nuclear generation accounted for 21.7% of total electricity generated in that quarter. This is based on nuclear power being low-carbon, affordable, dependable, safe and capable of increasing the diversity of energy supply. The UK Government's support echoes similar pro-nuclear political decisions in other jurisdictions, notably the UAE and Turkey. The events at Fukushima, Japan (March 2011) did not result in a reversal of this policy, unlike the nuclear phase-out announced by Germany and the cancellation of a new-build nuclear programme in Italy. Although the UK Government emphasises that it will be for energy companies to fund, develop and build new nuclear power stations in the UK, including meeting the full costs of decommissioning and their full share of waste management and disposal costs, the Office for Nuclear Development (within the Department for Business, Energy and Industrial Strategy) is taking active steps to establish and cement the right framework and conditions in the UK for investment in new nuclear power stations, with the aim of having new nuclear projects generating electricity this year.

The UK Government's strong support for nuclear power was shown in December 2017, when it announced that the UK had the potential to become a world leader in developing the next generation of nuclear technologies, with a suite of policy focuses published as well. Current policy emphasises establishing a healthy market in which plants can come online, whilst also fostering the development of new nuclear technologies. The government has announced that funding would be available until 2020 to support research and development into innovative advanced and small modular reactors, as well as to assess their feasibility and accelerate the development of promising designs. In fact, as of July 2018, the UK market was dominated by the following developments in the nuclear sector:

- Hinkley Point C is under construction and planned to come online in 2025 (EDF and CGN (as NNB Generation Company ("NNBG")) are currently constructing two EPRs (a type of reactor) at Hinkley Point C (3.2 GW));
- EDF and CGN also intend to construct two further EPRs at Sizewell (3.2 GW);
- Horizon Nuclear Power, owned by Hitachi-GE Nuclear Energy Ltd, intends to build two advanced boiling water reactors ("ABWRs") at each of its sites in Wylfa and Oldbury (2.7 GW each); and
- NuGen has proposed to build up to 3.8GW of nuclear power generation at Moorside, Sellafield.

It should be noted, however, that both the NuGen project and the Horizon Nuclear Power plant have been stalled: in late 2018, Toshiba announced it was withdrawing from the project and winding up its NuGeneration subsidiary, and in January 2019 Hitachi decided not to pursue its plans for the Wylfa and Olbury plants.

In addition, the UK's departure from the Euratom Community upon "Brexit", means that the UK must establish appropriate measures to ensure continued cooperation with, and adherence to, European nuclear standards and agencies. Exactly what "Brexit" will mean for the everyday running and operation of the sector (and the plants that make it up) remains to be seen.

Wind projects in the United Kingdom are expected to make up for the shortfall in low-carbon energy production resulting from the stalled nuclear projects. Recent notable wind projects include the Dogger Bank Offshore Wind Farm Projects and Hornsea III Offshore Wind Farm. Offshore wind is anticipated to generate over a third of the UK's electricity needs, attracting $48 billion in investment, and employing 27,000 people. The British government has put a fund of £557 million aside for subsidies for renewable energy, of which a sizeable amount is expected to be granted to offshore wind farms. The UK has 15 reactors generating 21% of the country's electricity supply, but almost half of this capacity is to be retired by 2025.

Transformation of the UK electricity market

From a policy perspective, in the Infrastructure Act 2015 the UK Government introduced the UK Guarantee Scheme, which is a mechanism that aims to enhance liquidity to ensure that investment in nationally significant and financially credible infrastructure projects does not stall due to adverse credit conditions. It works by offering a government-backed guarantee to help infrastructure projects access debt finance where they have been unable to raise finance in the markets. The UKGS can issue up to £40 billion of guarantees and is open to at least 2026. To date, it has issued nine guarantees totalling £1.8 billion of Treasury-backed infrastructure bonds and loans, supporting over $4 billion worth of investment.

In addition, the Energy Act 2013 was aimed at bringing about a "once-in-a-generation transformation" of the UK electricity market, and has had significant implications for the economics of investing in low-carbon generating technologies. EMR is the UK Government's key policy mechanism for ensuring security of energy supply through the development of low-carbon technology. The key policy measure to incentivise new low-carbon electricity generation is the provision of the contract for

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difference ("CfD") instrument, where a low carbon electricity generator and the Low Carbon Contracts Company ("LCCC" – a government owned limited company) enter into a contract that ultimately protects consumers from high costs and gives greater certainty of revenues to electricity generators.

The provision of CfDs is intended to stabilise revenues for investors in low-carbon electricity generation projects such as nuclear (and renewables) by helping developers secure the large upfront capital costs for low-carbon infrastructure. However, the long planning horizon for nuclear new-build projects and massive capital requirements pose substantial financial risks to nuclear power sponsors and investors. In the US, it was determined that US Government guarantees were necessary in order for new-build nuclear projects to be commercially viable. In October 2016, the UK Government confirmed that it had provided a government guarantee to EDF (France) to assist in bringing forward their investment in Hinkley Point C, the Somerset nuclear power plant. It has provided a guarantee for up to £2 billion that will be available from 2018 to 2020, if necessary conditions are met.

The CfD is a quasi-power purchase agreement: generators with a CfD will sell their electricity into the market in the normal way, and remain active participants in the wholesale electricity market. The CfD then pays the difference between an estimate of the market price for electricity and an estimate of the long-term price needed to bring forward investment in a given technology (the strike price). This means that when a generator sells its power, if the market price is lower than needed to reward investment, the CfD pays a "top-up". However, if the market price is higher than needed to reward investment, the contract obliges the generator to pay back the difference. In this way, CfDs stabilise returns for generators at a fixed level, over the duration of the contract. This mitigates the generator's long-term exposure to electricity price volatility, substantially reducing the commercial risks faced by these projects. The Energy Act 2013 includes a provision whereby the LCCC will act as the counterparty to eligible generators under the CfD. This mechanism was in direct response to concerns about the "credit" behind the CfD economics. Although a CfD is a private law contract between a low-carbon electricity generator and the LCCC, the cost of CfDs will ultimately be met by consumers via a levy on electricity suppliers.

The first CfD auction in January 2015 was a success, with a competitive allocation process, and the cost was £105 million less than the original strike prices published for the same technologies. It was a similar story for the Capacity Market auction, where the first auction procured capacity at almost half the expected clearing price. However, following the May 2015 General Election, there has been a decrease in pace in implementing the CfD and Capacity Market measures, which, in turn, created uncertainty for EMR. In July 2015, the Department of Energy and Climate Change (now the Department for Business, Energy & Industrial Strategy) confirmed the postponement of the next CfD auction round, and, subsequently, in November 2015, the Secretary of State for Energy and Climate Change confirmed that the delayed October 2015 CfD auction would not take place until the end of 2016. This postponement was partly caused by the UK Government's attempts to rein in the costs of supporting low-carbon electricity generation. Recently, however, the UK Government's commitment to the CfD auction programme has been renewed. There was a successful round in 2017 (where two offshore wind projects were awarded CfDs at £57.50/MWh), and a third round ran from May to September 2019, resulting in the government securing 5.8GW of new capacity. The auction cleared at the record low price of £39.650/MWh for Delivery Year 2023/24 and £41.611/MWh in 2024/25.

The BEIS announced a new round of CfD auctions for renewable energy projects to take place as of 29 May 2019. The upcoming auctions will include remote island wind schemes off the coast of Scotland.

These results and plans are consistent with the UK's new "Clean Growth Strategy", announced in October 2017 and based on the Climate Change Act 2008. This strategy confirms a commitment to cut greenhouse gas emissions, achieve clean growth, but also ensure that businesses and consumers have affordable energy. Practical measures under the Strategy include providing £20 million to support a new clean technology early stage investment fund.

Amongst other EMR policies was the establishment of a carbon price floor introduced on 1 April 2013, with the aim of encouraging additional investment in low-carbon power generation by providing greater support and certainty to the carbon price. Supplies of fossil fuels used in most forms of electricity generation became subject to either the climate change levy ("CCL") or fuel duty from that date. Such supplies are charged at the relevant carbon price support rate, depending on the type of fossil fuel used, which will be determined by the average carbon content of each fossil fuel. The carbon price support rates would reflect the differential between the future market price of carbon and the floor price determined by the UK Government. Until 2021, the CPF is frozen at £18 per tonne of CO_2. There have been repeated calls for longer-term clarity on carbon pricing and the CPF. In the 2017 Autumn Budget, the Government stated it was "confident" that the Total Carbon Price is set at the right level, and will continue to target a similar total carbon price until unabated coal is no longer used. The European Commission considered, but ultimately rejected, a similar system to reform the EU ETS.

In the 2018 budget, the UK Government announced the removal of Enhanced Capital Allowances ("ECAs") and First Year Tax Credits for technologies on the Energy Technology List as of April 2020. Savings generated from this will be reinvested in a newly-established Industrial Energy Transformation Fund, which, backed by £315 million of investment, aims to aid businesses with high energy use to decrease their energy bills and transition UK industry into a low-carbon, energy-efficient future. In November 2019, a consultation on the final design of the fund was completed.

Regulatory framework

The Office of Nuclear Development has focused on taking actions which are aimed at reducing regulatory and planning risks for investors. A planning regime has been proposed to aid the installation of nuclear reactors, including – following public consultation – identifying sites for new nuclear power stations to be built by the end of 2025. The UK Government legislated in the Energy Act 2008 to ensure that operators of new nuclear power stations will have secure financing arrangements in place to meet the full costs of decommissioning and their full share of waste management and disposal. The Energy Act 2013 also introduced measures to create a new independent statutory body, the Office for Nuclear Regulation ("ONR"), to regulate the nuclear power industry. The ONR and the Environment Agency are together undertaking a process of Generic Design Assessment ("GDA") of new nuclear designs, which allows the safety, security and environmental implications of new nuclear reactor designs to be assessed before an application is made for a licence and permissions are granted to a particular design of reactor on a particular site. In late December 2017, the Hitachi-GE UK Advanced Boiling Water Reactor ("UK ABWR") was granted approval, and confirmed as suitable for construction in the UK. The completion of this step is a significant one in the overall process to construct a new type of reactor in the UK.

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Shale gas

Shale gas fracking has long been an area of great interest and potential within the UK – the British Geological Survey estimates that there could be up to 1,300 billion cubic feet of shale gas in the north of England (primarily in the Bowland shale beneath Manchester, Liverpool and Blackpool) – equivalent to approximately 50 years of UK gas consumption. Further reserves are likely to exist in central and southern England. In December 2013, the UK Government's Department of Energy and Climate Change (now the Department for Business, Energy & Industrial Strategy) reported that up to half of the UK's land area might be suitable for fracking, including as yet unexplored deposits throughout much of eastern and southern England. US energy costs (partly as a result of significant investment by oil and gas buyers in US shale gas development) are currently one-third of those of Western Europe – a major issue for European exporters.

When UK shale oil was still in the early stages of exploration in the UK, the industry won an important early victory in 2016 when the government overturned local council objections to a fracking scheme in Lancashire. Scientists from the British Geological Survey ("BGS") have estimated that the total volume of gas in the Bowland-Hodder shale in northern England is approximately 1,300 trillion cubic feet.

In April 2015 and following the introduction of the Energy Act 2016, certain functions passed from the Department of Energy and Climate Change (now the Department for Business, Energy & Industrial Strategy) to the OGA, a newly created executive agency. Following this change, the process of obtaining consent to drill a well is the same irrespective of whether the well drills for conventional or unconventional gas: operators bid for exclusive rights to an area in competitive licence rounds. The operator then needs landowner and planning permission, which may require an environmental impact assessment.

On 16 July 2015, the UK Government laid draft regulations that defined the protected areas in which hydraulic fracturing will be prohibited. The draft regulations ensure that the process of hydraulic fracturing can only take place below 1,200 metres in specified groundwater areas outside National Parks, Areas of Outstanding Natural Beauty and World Heritage Sites.

However, fracking remained a controversial issue in the UK. In March 2018, the application by Ineos to explore for shale gas in South Yorkshire was rejected by local councillors, raising the cumulative total of planning rejections against fracking companies to seven in 2018 alone (mainly focused around the Midlands and the north of England). Interestingly, some of the rejections came from Conservative councils, despite the Conservative Government's Manifesto promise of developing a shale gas industry in the UK (the Labour Party, on the other hand, is anti-fracking).

The United Kingdom Onshore Oil & Gas industry group forecasts that fracking has the capacity to eliminate Britain's need to import gas by the early 2030's.

In what was seen by some commentators as an unexpected U-turn, in November 2019 the government halted fracking in England with immediate effect. Ministers also announced to shale gas companies that they would no longer support future fracking projects. The reason given for the moratorium was that the Oil and Gas Authority published a report into recent seismic activity at Preston New Road (the UK's only active fracking site in Lancashire), in which it was clear that the Government would be unable to rule out future unacceptable impacts on the local community.

Brexit Negotiations and the EU Withdrawal Bill

In June 2016, the UK voted to leave the European Union.

A period of uncertainty has followed, consisting of multiple drafts of withdrawal legislation, and requests for extensions to the EU-imposed deadline. A general election was called in December 2019 to secure a parliamentary majority that could solve the deadlock. A Conservative Majority was achieved on a pro-Brexit platform, and the United Kingdom ceased membership of the European Union on the 31 January 2020. As before, legislation derived from the EU and adopted or implemented by the UK remains in force whilst changes are slowly made. Therefore, many of the consequences of the withdrawal are yet to be realised, and can only be speculated upon whilst the UK's position remains under negotiation with the EU.

The effects of Brexit on the project finance market thus far, from vote to withdrawal, are both general and specific. In general terms, currency exchange volatility (the pound substantially weakened following the vote and has hit new lows in the subsequent years since the vote), and a restriction to the credit markets both negatively impacted the UK project finance market. In particular, the vote created uncertainty over the continued access of the UK to European Investment Bank Funding, which up to the vote had been an important source of funding for smaller-scale UK projects (in 2015, for example, the EIB provided £5.6 billion for 40 different projects, amounting to approximately one-third of total investment in UK infrastructure). At high level, the position appears to be that the UK can no longer be a member of the EIB if it is not also an EU member state. This means that any future relationship the UK has with the EIB will likely be with the UK as a third country. In late January 2019, the European Union Committee in the House of Lords published a paper analysing the impact of Brexit on the UK's relationship with the European Investment Bank, in which they criticise the Government's silence on the issue. The report also highlights the monetary cost of leaving the EIB: it is envisaged that despite the UK receiving its €3.5 billion capital investment in the EIB back over 12 years, the UK will not receive any share of the profits, interest or dividends that the EIB has accumulated. Additionally, the Committee worried that losing access to the EIB translates into losing access to cheaper and longer-term loans than those commercial lenders can provide. The Government response to this report stated that the UK's future relationship with EIB Group would be explored in the wider negotiations relating to withdrawal.

In late January 2020, the EU Financial Affairs Sub-Committee published a follow-up letter to this report and response. This letter restated key points made in the report which remain in issue, and called on the Government to seek to negotiate an ongoing relationship with EIB. The Committee also proposed considering the establishment of a UK infrastructure bank to help avoid a funding gap, as was also recommended by the National Infrastructure Commission. It is as yet unclear whether this guidance will be taken into account and pursued by the Government.

During the transition period, which is set to end on 31 December 2020, 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 under the rules must continue advertising and awarding public contracts in accordance with the EU directives. If the UK seeks to retain membership of the European Single Market, which now appears unlikely, it would have to continue to apply all EU public procurement directives.

It has been suggested in the legal press that there are reasons 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 Poors have commented that private finance initiatives should maintain their credit strength. They have also noticed that in the

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short term, projects have benefitted from the higher inflationary environment. On the other hand, five project financings have been downgraded from stable to negative (for example, Alpha Schools (Highland) Project, Aspire Defence Finance PLC and Consort Healthcare (Salford) PLC).

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

Notable recent project finance deals include the Hinkley Point C Project in Somerset, the Moray East Offshore Wind Farm project, the Beatrice Offshore Wind Farm project, the Triton Knoll Offshore Wind Farm project, the £2.2 million Thames Tideway Tunnel project, the Galloper Offshore Wind Farm, the £6.5 billion Thameslink Project, and the Intercity Express Programme Phase 1 public-private partnership ("PPP") refinancing.

The British government seeks to encourage low-carbon energy generation – particularly via the construction of offshore wind farms – through Contracts for Difference, for which up to £557 million of government funding is available. One such wind farm is the Walney Extension, a 659 MW offshore wind farm owned by Ørsted, PKA and PFA adjacent to the 367 MW Walney project off the coast of Cumbria. The Walney Extension became operational in 2018 and received government funding through a Contract for Difference awarded in 2014. It is hoped that such government support will enable the private sector to produce up to 2GW of new offshore wind capacity each year as of 2020.

As part of the National Grid's £750 million investment in London's electricity networks, London Power Tunnels is building a new network of cable tunnels in and around the capital. Phase 1 of the project sought to replace dated energy circuits and make maintenance more efficient and less disruptive to road users and was completed in February 2018. Construction of Phase 2 will begin in March 2020 and is projected to be complete by 2026, and will entail adding over 30km of tunnels between Wimbledon and Crayford.

The Thames Tideway Tunnel is a major infrastructure project aiming to upgrade London's sewerage system in order to meet the future needs of the city. Construction began in 2017, and tunnelling is currently underway, with all works expected to be completed by 2024. The Tunnel construction will employ over 4,000 people directly with several thousand more jobs in the supply chain and wider economy. It will also bring other regeneration benefits such as lifting constraints on future housing and other developments.

Of additional importance is the green light for HS2 that the Government granted in February 2020. Prime Minister Boris Johnson announced to the House of Commons that an HS2 Minister would be appointed, whose full time job would be to manage the project. The first phase of the project is due to open between 2028 and 2031, and the second phase was due to open in 2032–33, but this has been pushed back to 2035–40.

2 Security

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The new law, the Business Contract Terms (Assignment of Receivables) Regulations 2017, applies to contracts governed by English law and invalidates a clause which purports to prohibit the assignment of a receivable.

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?

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

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

A legal mortgage of shares involves the transfer of the relevant shares in the company to the lender from the outset, subject to an agreement for their re-transfer once the secured debt is repaid. The lender will be registered in the company's register of

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members as a fully entitled shareholder of the company, and not just as a mortgagee. As a result, the transfer will operate so as to give the lender all the rights of a shareholder. While the lender is registered as a shareholder, it will receive all dividends and any other money or assets paid in relation to the shares, and will be entitled to vote as a shareholder.

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

The CREST system allows CREST members to grant legal and equitable mortgages over their shares held in CREST.

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

A nominal fee is payable to Companies House on registration of security by a company. The fee does not vary according to the class of asset or type of security. Separate registration is required for each security document. The fee is currently £23 for registering a security document using the paper filing process, and £15 for using the electronic filing process.

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

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

Registration with Companies House requires the completion of a specified form and must be undertaken within 21 days of the creation of the security, or it will be void on insolvency and against other creditors.

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

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

On 6 April 2013, a new regime for the registration of security came into force via the Companies Act (Amendment of Part 25) Regulations 2013 No. 600. This regime is intended to streamline existing procedures and to reduce uncertainty over registration.

Principal features of the new registration regime include:

- **Scope of charges covered**: All charges created by a company are registrable except for a narrow range of excluded items. The company and any person "with an interest in the charge" is entitled to register the charge.
- **"Voluntary" registration**: Failure to register security is no longer a criminal offence. However, commercial sanctions for non-registration (whereby non-registered security becomes void against a liquidator, administrator or creditor and any secured debt becomes immediately re-payable) continue to apply. Security should still be registered within the 21-day window.
- **Filing, e-filing and statements of particulars**: Persons wishing to register security have the option of registering via an electronic filing system. Under this system, a statement of particulars must be filed online together with a certified copy of the charging document. The entire charging document is available to view online, although certain personal information (such as bank account details) can be redacted. There is no longer any need to send an original charging document to Companies House.

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

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

3 Security Trustee

3.1 Regardless of whether 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?

England and Wales fully recognise the concept of trusts. Trusts are normally used to create beneficial interests in assets which

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may differ from the strict legal ownership of those assets. Trust deeds are often used alongside debentures in England and Wales to create and regulate the holding of security over assets.

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

3.2 If a security trust is not recognised in 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?

This is not applicable in our jurisdiction. See question 3.1 above.

4 Enforcement of Security

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

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

The Financial Collateral Arrangements (No. 2) Regulations ("FCA") came into force in England and Wales in December 2003 in order to implement the Financial Collateral Directive (2002/47/EC), with the aim of simplifying the enforcement of security over cash, financial instruments (including shares, bonds and warrants) and credit claims.

The FCA Regulations 2003 were amended by the Financial Collateral Arrangements (No. 2) Regulations 2003 (Amendment) Regulations 2009 (SI 2009/2462) which came into force in October 2009. These amendments provided for changes in the Companies Act.

The FCA Regulations 2003 were further amended by the Financial Markets and Insolvency (Settlement Finality and Financial Collateral Arrangements) (Amendment) Regulations 2010 (SI 2010/2993) (FCA Amendment Regulations 2010). These came into force on 6 April 2011 and included credit claims as financial collateral.

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

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

"Foreclosure" has a narrower meaning under English law than it does in the US.

Foreclosure in the context of security over an asset is the process by which the mortgagor's rights in the secured asset are extinguished (the mortgagor's equity of redemption is extinguished), and that asset becomes bested in the mortgagee.

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 on sale of a mortgaged asset, and (pursuant to the "equity of redemption") to return any excess proceeds over the secured debt finalised by it to the mortgagor. In general, under English law, foreign investors are treated differently from businesses established in England and Wales in relation to the enforcement of security.

5 Bankruptcy and Restructuring Proceedings

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

There are different types of insolvency proceedings under English law:

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

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

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

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

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

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

A creditor with a claim that ranks in priority to other unsecured creditors and (in corporate insolvencies) to floating charge holders and the prescribed part (Schedule 6 and sections 175, 176, 328, 347 and 386, Insolvency Act 1986) is a preferential creditor. Employees are usually the only preferential creditors following the introduction of the Enterprise Act 2002 (they will receive wages, holiday pay and contributions to pensions). In order of priority, a party secured by way of mortgage or fixed charge will rank ahead of any preferential creditors. Preferential creditors are paid from the proceeds of floating charges, which are ranked below the fixed-charge creditors but above all other unsecured creditors.

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

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

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

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

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

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

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

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

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

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

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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?

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

UK and EU competition rules may impact ownership by companies with UK, EU or global business turnovers exceeding specific thresholds. Compliance with EU directives may impact an entity's ability to invest in or own certain assets. The outcome of the deal negotiations with the EU in the coming months should clarify whether this position will change in 2021 when the UK exits the EU.

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

The UK has signed bilateral investment treaties, protecting investor rights, with around 120 countries.

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

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

7 Government Approvals/Restrictions

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

The exact nature of the project will determine which regulatory bodies and/or UK Government agencies will have authority over the project. However, there are a number of bodies which have an overarching function in respect of development related to the typical project sectors.

Local Authorities

The majority of onshore projects will require planning permission, and the identity of the body granting planning permission depends on the nature of the project. Planning permissions are usually granted by the local authority of the relevant area. Local authorities are also responsible for granting consent for the storage of large quantities of hazardous substances, such as natural gas and chemicals. Local authorities, and the London Mayor, introduced the Community Infrastructure Levy in April 2010, which is a charge attached to development once it has been granted planning permission, to fund and pay for the maintenance of local infrastructure.

National Infrastructure Planning

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

Welsh Assembly Government

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

Environment Agency ("EA")

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

Health and Safety Executive ("HSE")

The HSE is the principal regulator for all health and safety issues in Great Britain.

Marine Management Organisation ("MMO")

The MMO implements and regulates the UK's marine planning and licensing system in respect of all offshore construction works.

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

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

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

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

Land

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

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Water

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

Wind, wave, tidal and solar energy

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

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

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

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

Oil and gas

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

Coal

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

Gold and silver

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

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

Owners of minerals may receive royalties in relation to the extraction of minerals. Such royalties would be subject to UK tax. From April 2013, all mineral royalties are taxed 100% to income tax rather than 50/50 to income and capital gains tax, as before. There may be restrictions in place in relation to the extraction and exploitation of natural resources. For example, the Environment Agency has discretion to refuse to grant water abstraction licences if it believes there will be a detrimental environmental effect.

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

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

There are no general restrictions on foreign currency exchange.

The Money Laundering Regulations could be relevant, and apply to all categories of businesses, including those active in the UK financial sector.

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

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?

The UK is business-friendly (at the time of writing, still a gateway to the European Union, and has relatively low levels of bureaucracy). There is no exchange control regulation, which means that repatriation of funds is straightforward subject to international sanctions that may be in place (for example, against North Korea). There is no discrimination in favour of local companies and there is no requirement to reinvest profits in the UK.

Remittance applies on an individual basis when a non-UK domiciled UK resident can choose to pay tax on the "arising basis" or on the "remittance basis". The latter is when the individual pays tax on UK income and gains and on any foreign income or gains that are brought into (remitted to) the UK.

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

Subject to UK and EU sanctions (the future impact of which will become clear once negotiations with the EU regarding the UK's exit have become clearer) and the Money Laundering Regulations, project companies in England and Wales can establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions.

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

No; only as agreed contractually amongst the shareholders of a project company, its lenders and the parent. There are UK- and EU-specific tax implications, however.

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

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

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

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

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

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

EU Industrial Emissions Directive (2010/75/EU)
At the time of writing, the Industrial Emissions Directive is the main EU instrument, aiming to prevent or reduce emissions to air, land and water from industrial installations. The Directive requires installations within its scope to operate under a permit and streamlines permitting, reporting and monitoring requirements to simplify and reduce the administrative burden on operators.

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

We note that the detail of the UK's future relationship with the EU is yet to be made clear.

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

We note that the detail of the UK's future relationship with the EU is yet to be made clear.

Climate change
The Climate Change Act 2008 established a framework to develop an economically credible emissions reduction path. The Department for Business, Energy and Industrial Strategy focuses on climate change and energy supply.

Environmental Damage (Prevention and Remediation) (England) Regulations 2015
These Regulations implement the EU Environmental Liability Directive (2004/35/EC) in England. There are equivalent regulations in Wales. They apply to damage to species, habitats or water, or risks to human health from contamination of land, and require those responsible to take immediate action to prevent damage occurring or remediate damage where it does occur.

We note that the detail of the UK's future relationship with the EU is yet to be made clear.

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

We note that the detail of the UK's future relationship with the EU is yet to be made clear.

Health and safety legislation
The Health and Safety at Work, etc. Act 1974 provides the framework for health and safety regulation in England and Wales. The Act is enforced by the Health and Safety Executive and local authorities, although in general the HSE will be the regulator for major projects. Other legislation such as the Control of Major Accident Hazards Regulations 2015/483 may also apply to major projects.

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

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

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

We note that the detail of the UK's future relationship with the EU is yet to be made clear.

8 Foreign Insurance

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

There are no restrictions on insurance policies over project assets provided by foreign insurance companies, unless the foreign insurance company is carrying out and effecting the insurance in the UK.

If the foreign insurance company is carrying out and effecting the insurance in the UK, it may require authorisation by the Prudential Regulation Authority ("PRA"), and may therefore have to comply with the PRA rules, unless it can rely on European Economic Area ("EEA") "passporting" rights or other exclusions. The PRA was created by the Financial Services Act 2012 and is part of the Bank of England. We note that the detail of the UK's future relationship with the EU is yet to be made clear.

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

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

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9 Foreign Employee Restrictions

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

The general position is that EEA nationals have the automatic right to work in the UK by virtue of being an EU citizen. In addition, Swiss citizens and Commonwealth nationals who have a grandparent born in the UK or the British Islands have been granted permission to work in the UK. Unless an individual falls into one of these categories, they must obtain immigration permission to work in the UK under the Points-Based System ("PBS") by falling into one of the new tiers (employers must be aware there are five distinct tiers) of the PBS or be a dependant of a migrant coming to the UK under one of the tiers. With the exception of Tier 1, migrants must be "sponsored" before they can apply to enter or remain in the UK. UK employers need to obtain a sponsor licence from UK Visas and Immigration ("UKVI") before they can employ migrants under Tiers 2–5. Tier 1 categories require migrants to make their own applications to enter and stay in the UK to work.

Brexit will impact the immigration system, but what the immigration system will look like in meaningful terms is yet to be seen as negotiations continue.

10 Equipment Import Restrictions

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

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

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

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

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Force majeure provisions and exclusions are set out in virtually all project documents, and although the term "*force majeure*" is derived from French law with no recognised meaning under English law, such provisions and exclusions are enforceable under English law provided that they are properly defined in the agreement. Normally *force majeure* exclusions do not apply to payment obligations.

12 Corrupt Practices

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

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

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

(1) Offering (or promising or giving) a bribe, intending that another person perform their duties improperly (or rewarding them for having done so).
(2) Accepting (or requesting or agreeing to accept) a bribe, intending that duties will be performed improperly.
(3) Bribing a foreign public official in order to retain business or to gain an advantage in the conduct of business.
(4) Failure of commercial organisations to prevent bribery on behalf of the organisation. If any person associated with an organisation is found guilty of bribery, then the organisation is deemed guilty of an offence, unless it can show it had adequate procedures in place to prevent those people from committing bribery.

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

For natural resources companies operating in countries where government offices are seen by some in positions of influence as an opportunity to accumulate personal wealth and as involving tasks which justify small additional financial incentives, the Bribery Act presents a significant compliance challenge, not least because the list of those who can expose the company and risk a criminal conviction extends well beyond its employees.

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

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

13 Applicable Law

13.1 What law typically governs project agreements?

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

13.2 What law typically governs financing agreements?

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

13.3 What matters are typically governed by domestic law?

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

14 Jurisdiction and Waiver of Immunity

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

Judgments obtained through a party's submission to a foreign jurisdiction may be legally binding and enforceable, provided the conditions for recognition and enforcement of those judgments are fulfilled. Judgments, relating to civil and commercial matters, of EU Member State courts (except Denmark), dated from 10 January 2015 onwards, will be enforceable in England and Wales pursuant to the Recast Brussels Regulation (EU 1215/2012). Similar rules apply to Iceland, Norway and Switzerland pursuant to the 2007 Lugano Convention. Judgments of courts of some non-EU States (mainly Commonwealth members) with which reciprocal conventions exist will be enforced by a different process of registration under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. We note that the detail of the UK's future relationship with the EU is yet to be made clear.

Judgments of courts of all other States will usually be enforced through new English proceedings and the English courts must recognise the basis on which jurisdiction was accepted by the ruling court; namely, territorial or submission. Typical exceptions to these regimes include: judgments obtained following fundamental procedural irregularities; proceedings brought in breach of statutory or international convention obligations; or where the judgment is based upon fraud, is contrary to English public policy or natural justice, or is contrary to the Protection of Trading Interests Act 1980 (e.g. for multiple damages).

Sovereign immunity is governed by the State Immunity Act 1978. The starting point is that a State or State entity will enjoy sovereign immunity from both suit and attachment. However, the Act contains several ways in which a court can disregard this immunity, such as a consensual waiver. If the usual conditions for recognition and enforcement of a judgment are fulfilled, a State will not benefit from immunity if it would not have been able to claim immunity had the proceedings been brought in the UK. Ordinarily, where a sovereign entity is acting in a private or commercial capacity, it will not be entitled to claim sovereign immunity from suit or attachment.

15 International Arbitration

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

Contractual provisions in project documents governed by the laws of England and Wales requiring submission of disputes to international arbitration are generally recognised, and supported by the courts of England and Wales. Provided 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.

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

The UK has been a Contracting State to the New York Convention since December 1975.

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

Whether or not a matter can be subject to arbitration is determined on a case-by-case basis, although arbitration is, in general, limited to civil proceedings. Criminal or family law matters, or matters relating to status, are not capable of being submitted to arbitration. Disputes in which the UK Government has a direct interest, such as criminality, cannot be submitted to arbitration. However, a claim for compensation arising out of a criminal act may well be arbitrated (for example, in respect of a claim for trespass to the person or property, as these would be civil actions). Divorce also cannot be arbitrated and can only be granted by the courts in England and Wales, though the division of property might be subject to arbitration proceedings, provided that the arbitrator was not involved in the initial divorce proceedings. Similarly, succession issues do not lend themselves to arbitration and wills are usually only contested in court, though certain matters involving trusts might well be arbitrated. Again, the beneficiaries of a will can agree to a different method of sharing out the estate and could enlist the help of an arbitrator in reaching a settlement. Arbitration of issues involving minors and the insane is sometimes possible, but enforcement will be subject to the same constraints as apply to the courts in respect of enforcement of claims against minors and the insane for public policy reasons.

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In some disputes, parts of claims may be arbitrable and other parts not. For example, in a dispute over patent infringement, a determination of whether a patent has been infringed could be adjudicated upon by an arbitration tribunal. However, the validity of a patent would not ordinarily be arbitrated, as patents are subject to a system of public registration. Therefore, an arbitral panel would have no power to order the relevant body to rectify any patent registration based upon its determination. It is relevant to note 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 (see *Accentuate Ltd v ASIGRA Inc.* [*2009*] *EWHC 2655*), this approach has not been followed in subsequent cases (see *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [*2014*] *EWHC 2908* (*Ch*)). This 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.

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

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

16 Change of Law / Political Risk

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

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

17 Tax

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

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

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

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

18 Other Matters

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

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

Change of law remains (as in all other jurisdictions) a risk for investors in the UK (albeit a risk of very low magnitude, but examples include the early closure of the Renewable Obligation regime in the UK), given the inability of any administration to tie the legislative hands of its successors.

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

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

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

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

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

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

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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.

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

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

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

The approach of the English courts, in the main, has been to distinguish between the *Shari'ah* and the contractual governing law of an Islamic finance agreement by ruling that *Shari'ah* issues are not justiciable in the English courts. That element of the agreement is deemed as forming part of the commercial agreement (which English courts will rarely interfere with) and not the legal agreement. Instead, the dispute will be dealt with by applying the ordinary principles of English law, and an English court will avoid ruling or commenting on the compliance of the agreement with *Shari'ah* (see *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [*2003*] *2 All* ER (*Comm*) *84*). This approach was reaffirmed in a recent English High Court case, *Dana Gas PJSC v Dana Gas Sukuk Ltd & Ors [2017] EWHC 2928*, where Dana Gas (an issuer based in the UAE) was attempting to render its *mudarabah sukuk* unenforceable on a number of grounds, one of which was that its *sukuk* was not *Shari'ah*-compliant.

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

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

Generally, the inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability in England and Wales, unless that interest payment obligation is deemed a penalty offending the rules laid down in *Dunlop Pneumatic Tyre Co Ltd v New Garages & Motor Co Ltd* [*1915*] *AC 79* and *Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis* [*2015*] *UKSC 67* (*Cavendish*). Note that a contractual provision for payment of a higher rate of interest after a default in payment by a borrower could be deemed to be a penalty; however, this will be difficult to establish in view of the new test set out in *Cavendish* which requires that the clause in question impose a detriment on the contract breaker "*out of all proportion to any legitimate interest of the innocent party*". In determining this, an English court will now consider the wider commercial context of a transaction and, where the parties have negotiated a contract, on a level playing field and with the assistance of professional advisors, it will now be much harder for the party paying the higher rate of interest to challenge the validity of such a provision on the basis that it is a penalty. Furthermore, a provision that provides for interest to increase on default is not likely to be held to give rise to a penalty if: (i) the increase is levied only from the date of default (and not before); (ii) the main purpose of the clause is not to deter default; and (iii) the increase is modest and commercially justifiable by reason of the increased credit risk represented by a debtor in default.

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