International
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Legal Guides

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?

The project finance market in the United States is among the most mature and remains highly active, with transactions continuing to be executed across a diverse range of industries and asset classes. In 2020, we are watching to see how volatility in the oil price will affect the infrastructure build-out that has been associated with the shale oil and gas boom and whether major LNG export facilities will be in a position to tap markets for capital. In electricity markets, innovation and the growing demand by States and energy consumers for a diverse and clean energy mix is driving investment into new areas, including offshore wind and battery storage. Other areas such as ports and airports, rail and transit, energy efficiency, data centres and communications infrastructure have been attracting substantial capital investments, as sources of capital continue to expand what is included within "infrastructure" and some large infrastructure projects are developed under public-private partnership structures. Market participants will be closely watching the national election and potential outcomes for U.S. policy (including trade and infrastructure), key decisions will be made (or not made) at the Federal Energy Regulatory Commission ("FERC") and environmental matters remain at the forefront of regulatory discussions.

I. Record U.S. Crude Oil Exports and Challenges in Natural Gas Sector

For the first time in 75 years, the U.S. became a net exporter of petroleum in the fourth quarter of 2019. This new status is almost entirely due to production increases from the shale boom; domestic demand has remained relatively flat. Trade policy has also had some impact. The Trump administration has, in recent years, instituted sanctions against Iran's petroleum industry and PDVSA, the Venezuelan State-owned oil company. In December 2019, the Department of Treasury instituted sanctions against Gazprom's Turk Stream project (from Russia to Turkey, through the Black Sea) and, in the face of objections by Germany, the NordStream 2 gas transmission pipeline from Russia (traversing Denmark, Finland and Sweden's territorial waters) to Germany.

The consistent production growth since the shale boom of 2008 has magnified deficiencies in the midstream sector, particularly petroleum transmission, treatment and storage terminals. Gas transmission infrastructure is under significant strain, as evidenced by 1.15 Bcf/d of vented or flared gas (a by-product of crude oil production) in the Permian Basin – representing a sixfold increase since 2017, and an all-time high. Some oil producers have resorted to paying third parties with transportation capacity to take their gas so that they can keep producing crude oil, with the Waha hub (located in the Permian Basin) spot price dipping into negative figures for periods between April and July 2019.

The sharp growth in demand for gas transportation infrastructure has led to various sponsors pursuing large gas transmission projects, with Kinder Morgan's 2Bcf/d Gulf Coast Express pipeline coming online in September 2019, and its 2.1 Bcf/d Permian Highway project expected to come online in late 2020. Stonepeak's Whistler 2.0 Bcf/day pipeline is expected to follow in mid-2021. All three projects run from the Waha hub towards the Gulf Coast. As gas transportation infrastructure is developed, we expect that the potential of the U.S. LNG export industry will be unlocked.

II. U.S. LNG Export Projects Continue to Gather Momentum

2019 saw a continuation of the rapid growth in U.S. LNG export capacity, with the first trains for three large projects in the U.S. – Freeport LNG in Texas; Cameron LNG in Louisiana; and Elba Island in Georgia – all commencing commercial operation. According to the IEA, U.S. LNG exports are expected to overtake Australia and Qatar, the current market leaders, in 2024.

2019 saw significant LNG export projects approved by the FERC, including Tellurian's $28 billion Driftwood project in Louisiana, Sempra Energy's Port Arthur project in Texas, and Venture Global LNG's $5 billion Calcasieu Pass LNG export terminal in Louisiana. The three existing operating LNG export terminals in the U.S., Sabine Pass, Corpus Christi and Cove Point, have utilised project finance facilities, and the scale of capital required in respect of these new LNG projects is expected to generate considerable demand for additional project financing when they proceed which, given the scale of debt financing required, can be expected to result in challenges and capital constraints in securing commitments for the LNG pipeline.

The ability of export facilities to secure long-term offtake arrangements will underpin the viability of new construction and the availability of capital, and certain offtakers overcommitted to volumes in contracts executed from 2011–2013 and, with those contracts up for renewal (and in some cases, being renegotiated), buyers are increasingly seeking more flexibility on take-or-pay arrangements and shorter tenors. We have seen signs that the increasingly liquid global LNG market will cause renewed interest among sponsors in looking towards smaller scale LNG export terminals, including offshore floating LNG options.

III. Politicisation of Energy Regulatory Matters

It has become increasingly contentious and challenging to permit and build natural gas infrastructure. Some local opposition to energy infrastructure projects has always been anticipated;

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however, the debate over energy infrastructure is no longer a local issue as interest groups have become more sophisticated and coordinated and have taken a national approach, and many new midstream and oil and gas assets are subjected to challenges by environmental groups. Moreover, under the U.S. federal system, where power is divided between State and Federal authorities, the interests and objectives of those decision makers can often conflict. The FERC is the lead agency for the environmental review under the National Environmental Policy Act ("NEPA"); however, State authorities are responsible for key decisions. The Commission's approval of the Jordan Cove project in Oregon was unexpectedly delayed in late February as more time was sought for the FERC to consider the denial of a Coast Zone permit by the State. A key point of contention has recently been Section 401 of the Federal Clean Water Act, which requires a State water quality permit to be granted for the construction of facilities that may result in a discharge of pollution in that State. States such as New York, which have generally been opposed to further midstream development, have been involved in contentious litigation on delays and denials of these permits. The Trump administration and the Environmental Protection Agency have substantially curtailed the scope of this authority by Executive Order and rulemaking that is being finalised at the beginning of 2020.

In an election year and with climate policy a headline political issue, the make-up of the FERC is under significant scrutiny. Republican commissioners are widely anticipated to be more aligned with the Trump administration's objectives of encouraging fossil fuel production and exports, particularly given recent partisan splits at the FERC on the evaluation of carbon emission impacts in new midstream infrastructure. At the start of 2020, the Commission has two Republican commissioners and one Democrat. Republican Bernard McNamee has announced his intention to leave the FERC at the end of his current term in 30 June 2020. Without a replacement, his departure would leave the FERC with only two Commissioners and an increased likelihood of deadlocks on major decisions. The President has re-nominated a third Republican, James Danley, to the Senate for confirmation. Although there is currently a majority of Republicans in the Senate, McNamee only assumed office on 11 December 2018 after a difficult Senate confirmation process, which culminated in a 50-49 vote.

IV. Challenges and Opportunities in Electricity Markets

In June 2018, the FERC issued an order, on a split 3-2 vote, responding to proposed revisions to the electric capacity market administered by PJM, L.L.C. ("PJM", the regional grid operator for the U.S. mid-Atlantic region covering 14 States) that would address State-subsidised generating resources (i.e. nuclear power plants receiving zero emissions credits, and wind and solar projects backed by a State renewable portfolio standard). PJM had presented the FERC with a choice between two alternative proposals, either of which, PJM argued, would satisfy the "just and reasonable" standard of review under the Federal Power Act. In its order, the FERC rejected both proposals, and took the additional step of declaring the existing structure of PJM's capacity market as "unjust and unreasonable". The FERC proposed a new plan and ordered that PJM develop a new market design. On 19 December 2019, on a 2-1 split vote, the FERC finally adopted a proposal that requires all State-subsidised generating resources that participate in the capacity market to meet a stringent minimum offer price rule that would effectively negate the bidding advantages of the State subsidy or withdraw from capacity market participation altogether. Many parties have sought rehearing of the FERC's order and, on 18 February 2020, the FERC issued a tolling order extending the time for its reconsideration of the merits. Several State officials have threatened to withdraw from PJM if the FERC ruling is not revised.

The lengthy period to resolve this issue of market design required the postponement of PJM's base residual auctions for the 2022/2023 and 2023/2024 delivery years, which at the beginning of 2020 have yet to occur. This failure to set forward pricing in a timely manner has created significant challenges for forward planning by participants in the PJM markets, including those seeking finance or that rely on this forward pricing to determine cash sweeps or distribution rights under existing financings. The challenge has been acute for highly levered merchant generators given their exposure to low electricity prices, which have been caused in part by low fuel costs. Recent experience in ISO-NE nevertheless demonstrates the potential impact of the FERC's decision in PJM for thermal power sources. The February 2020 results of ISO-NE's forward capacity auction for the 2023/2024 obligations period produced an almost 50% decline in the capacity price, a result that was partially attributed to the participation of "Renewable Technology Resources" as price-takers. This is a limited designation that will be exhausted in the next forward capacity auction. All of these developments in the capacity markets have made it more challenging to develop new-build power projects.

As investment and grid composition has moved from traditional thermal generation sources towards a more intermittent but emission-free renewable generation, reliability planning is increasingly a challenge for regulators and market participants. In the face of this challenge, we have seen increased interest in the development of demand response and distributed generation and storage assets. Storage solutions, such as pumped-storage hydro and battery storage, can operate as alternatives to gas-peaking plants in periods of peak demand, enhancing reliability and assisting to manage the continual integration of renewable energy into the grid. Offshore wind, which has greater consistency of wind resource and is generally located closer to load centres, is also expected to expand significantly in the United States as developers leverage technical expertise from Europe (the first U.S. offshore wind project, Deepwater Wind's 30 MW Block Island Wind Farm, has demonstrated a good operational record and was refinanced in Spring 2018). The challenges in delivering and financing these capital-intensive projects, including the lengthy and multi-faceted construction process, a heavy European supply chain and a multi-contract procurement model, rely on certainty of financing and revenue sources (including access to capacity markets and contracted pricing).

The enormous growth in the United States renewables market has been assisted by a substantial amount of tax equity investment, where financial institutions and large corporates invest capital in renewable energy transactions (principally wind and solar projects) with the return on their investments based largely upon the tax benefits (tax credits and depreciation deductions) expected from their investment. The investment tax credit ("ITC") begins its step-down in 2020 (this is the tax credit used for solar tax equity investments, with wind projects typically utilising the production tax credit ("PTC")) from 30% of eligible cost basis for projects on which construction began before 2020 to 26% for projects on which construction begins in 2020. The ITC is scheduled to eventually fall to 10%. The end of 2019 saw many solar project sponsors enter into financing arrangements to purchase equipment to safe harbour to help qualify solar projects that are finished after 2019 as eligible for the 30% ITC under rules governing the commencement of construction. That equipment is all expected to be deployed in new solar projects over the next few years.

The PTC for wind was set to expire for wind projects on which construction began after 2019. However, Congress extended the PTC (at 60% of its original rate) for wind projects on which construction begins in 2020.

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V. U.S. Wind Overtakes Hydroelectric Capacity and Generation

For the first time, 2019 saw the total installed nameplate capacity of wind turbines exceed the total capacity of the U.S. fleet of hydroelectric generators, including pumped storage facilities. Total nameplate capacity of utility scale wind projects in the U.S. reached 105,583 MW, according to trade association sources, whilst the total capacity of conventional and pumped storage hydroelectric facilities is 100,800 MW, as reported by a FERC staff analysis. In terms of annual output, the U.S. Energy Information Administration reports that U.S. wind electricity generation for 2019 totalled 300.07 million MWh, whilst hydroelectric generation totalled 273,71 million MWh. Wind energy has displaced hydroelectric as the fourth leading source of electricity in the U.S., behind natural gas, coal and nuclear, respectively. U.S. wind projects are predominantly developed by independent power producers and are project financed.

Although the 2020 outlook for onshore wind projects in the U.S. is favourable, the outlook for offshore projects has been clouded by regulatory problems. The lead U.S. governmental agency responsible for issuing permits for wind projects located on the outer continental shelf is the Bureau of Ocean Energy Management ("BOEM"), an administrative entity within the U.S. Department of the Interior. In a proceeding involving Vineyard Wind, a proposed 800 MW project to be located off the coast of Massachusetts, BOEM prepared a Draft Environmental Impact Statement ("EIS") that was issued for public comment in December of 2018. A Final EIS was expected in the June 2019 timeframe, for an approval of the project later in 2019. However, BOEM announced in the summer of 2019 that it would prepare a Supplemental EIS in order to evaluate the cumulative environmental impacts of multiple offshore wind energy projects. A draft of the Supplemental EIS is now scheduled for release on 12 June 2020, with a Final EIS scheduled for 13 November 2020 and final action on all required permits scheduled for 18 March 2021. As the ITC begins to step-down, the delay in receiving BOEM authorisation has created uncertainty around the amount of credit the project will be eligible for.

Approximately 20,000 MW of offshore wind projects have been proposed for the U.S. east coast, but the economics of many projects are uncertain, pending qualification for the tax credit, which will depend on any extensions to be negotiated in future Federal budget cycles.

VI. Adoption of Public-Private Partnerships in the United States

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

PPPs have been utilised by universities such as Ohio State for their parking assets, and States such as Texas, California, Florida and Virginia have enacted enabling statutes to undertake substantial infrastructure projects. The model has been applied most regularly for transportation infrastructure (including roads, bridges, airport facilities, rail projects and parking concessions), water supply and treatment facilities and social infrastructure projects (including courthouses, public universities and military housing). Familiarity with the model and its adoption by procurement authorities has been mixed in the U.S., and there is varying consistency in terms across deals. This has meant that the model has been used most often for mega-projects which can absorb the transaction costs, though we expect the use of PPPs to be adopted more widely as market participants become more familiar with this procurement method. Federal involvement to assist in standardising project structures and terms has been consistently discussed but, while there has been Federal legislation to support access to assistance for transportation and water infrastructure, substantial progress has yet to be made on a national approach.

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

The USA remains one of the world's oldest and largest markets for project financings, with a constant volume of deals in energy and infrastructure. There is an extraordinary diversity of deals across industries and financing sources, including tax equity investors, bank syndicates, bond markets and direct lenders. Significant financings include the first-of-its-kind financings for new types of resources such as the financing for the Block Island offshore wind farm, the financing of large infrastructure projects such as JFK airport in New York under the PPP procurement method, and the deployment of billions of dollars in capital into large LNG projects such as Cove Point.

2 Security

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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3 Security Trustee

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

Yes. Under New York law-governed security documents where there are multiple lenders or syndication is contemplated, a collateral agent is nearly always appointed to act on behalf of the lenders with respect to the collateral.

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

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

4 Enforcement of Security

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

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

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

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

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

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

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

5 Bankruptcy and Restructuring Proceedings

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

Once a bankruptcy case is commenced under the Bankruptcy Code in respect of a project company, the Bankruptcy Code imposes an "automatic stay", or statutory injunction, which

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

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

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

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

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

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

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

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

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

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

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

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

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

6 Foreign Investment and Ownership Restrictions

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

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

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

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

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

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

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

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

7 Government Approvals/Restrictions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yes, they can.

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

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

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

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

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

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

In terms of international frameworks, the Equator Principles are voluntary and would only be used with respect to a project if required by the applicable financial institution and for certain types. As of 15 February 2020, 101 financial institutions in 38 countries have adopted the Equator Principles. Since the U.S. has comprehensive environmental laws and is considered a "designated country" under the Equator Principles, covenants to comply with environmental law in conjunction with the performance of standard due diligence are often deemed sufficient for projects located in the U.S. As a result, representations and warranties and covenants expressly related to the Equator Principles are often either not included in the applicable project agreement or limited to a general statement of material compliance with the Equator Principles. However, the Equator Principles Association adopted a new version of the Equator Principles in November 2019 and will take effect in July 2020. The new version, referred to as Equator Principles IV or EP4, imposes additional obligations and a higher level of scrutiny related to domestic projects, which, in turn, could lead to an increase in the scope and extent of related covenants, and representations in applicable project agreements may also increase.

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

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

8 Foreign Insurance

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

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

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

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

9 Foreign Employee Restrictions

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

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

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

10 Equipment Import Restrictions

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

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

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

The Harmonised Tariff Schedule provides duty rates based on the classification of the imported equipment.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

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

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

12 Corrupt Practices

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

Yes, the Foreign Corrupt Practices Act of 1977 ("FCPA") contains two sets of relevant provisions: (i) its anti-bribery

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

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

13 Applicable Law

13.1 What law typically governs project agreements?

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

13.2 What law typically governs financing agreements?

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

13.3 What matters are typically governed by domestic law?

Please see questions 13.1 and 13.2 above.

14 Jurisdiction and Waiver of Immunity

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

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

15 International Arbitration

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

Yes, they are typically recognised by local courts.

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

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

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

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

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

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

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

16 Change of Law / Political Risk

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

Generally, no.

17 Tax

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

Withholding of U.S. Federal income tax at a rate of 30% is generally required on payments of interest, dividends, royalties and other amounts (not including principal on loans or distributions by corporations that are treated as returns of capital) to foreign persons unless attributable to a branch office maintained by the recipient within the United States. The United States maintains

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treaties with numerous jurisdictions that reduce or eliminate these withholding taxes on amounts paid to qualified residents of the counterparty treaty country. In addition, interest paid to foreign persons, other than banks on loans made in the ordinary course of business, is exempt from this withholding tax if certain requirements are satisfied, including that the loan is not in bearer form and the lender is unrelated to the borrower.

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

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

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

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

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

18 Other Matters

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

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

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

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

19 Islamic Finance

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

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

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

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

A less commonly used structure is the *Sharikat Mahassa-Murabaha* structure. Under this structure, the borrower and the

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

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

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

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

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

No, subject to State usury laws restricting excessive interest.

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