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The International Comparative Legal Guide to:

# Project Finance 2015

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A practical cross-border insight into project finance

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# USA

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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in the USA?

After almost six years of unprecedented growth, the U.S. shale oil industry is facing the reality of the plummeting price of oil globally. The dramatic decline in oil prices (approximately 50%) since mid-2014, due to surging U.S. production and slower economic growth in China, Europe and emerging markets, poses a significant challenge for energy companies across the entire value chain from E&P to midstream and downstream. Already many companies are reducing 2015 capital expenditure budgets by 10-30% and drilling rigs are being idled. Oil field service companies are down-sizing. At the same time, productivity increases in petroleum and natural gas exploration and production are keeping current supply levels robust, particularly in Texas and North Dakota. A decline in U.S. shale production to match falling prices is not expected until later in 2015 at the earliest. Compounding falling oil and gas prices are concerns that some companies in the energy supply chain have leveraged up through high yield bonds to expand production and may encounter financial distress if oil and gas prices remain depressed over the next few years. If the decline persists over the long-term, it could spur merger and acquisition ("M&A") activity and special situation financings in the industry.

Falling oil prices coupled with weak demand in Europe and Asia are creating headwinds for the development of additional North American liquefied natural gas ("LNG") export projects. The development of LNG export projects is a capital-intensive activity with development costs often exceeding US$200 million to obtain Federal and state regulatory approvals. Last year, more than US$25 billion of capital investment flowed into large-scale LNG Projects – including for the approximately US$11 billion Freeport LNG, US$3.4 billion Cove Point LNG and US$10 billion Cameron LNG projects.

Historically, long-term LNG offtake contracts were indexed to oil prices and one of the important drivers of U.S. LNG export trade was the opportunity to negotiate LNG supply contracts indexed to the U.S. Henry Hub natural gas price. As Asian LNG prices have fallen from US$16-$18 per 1,000 cubic feet ("mcf") to US$8-$10 per mcf (due primarily to the declining oil prices), much of the price advantage of U.S. LNG landed in Asia has been eroded. Over 30 large LNG export projects have applied to the Department of Energy, Office of Fossil Energy ("DOE") for authorisation to export LNG to countries without free trade agreements granting national treatment for natural gas with the U.S. ("non-FTA"). At this time, only three such large projects have received their final DOE non-FTA export authorisations. The Federal Energy Regulatory Commission ("FERC"), which has separate authority to approve the construction of LNG export facilities under the Natural Gas Act ("NGA"), has approved five projects, while 14 other NGA applications are pending and 13 more LNG export projects have been proposed without an NGA application having been filed.

However, given the recent downturn in the LNG market, it is unclear how much initial investment in LNG may come to fruition. Cheniere Energy's approximately US$12 billion Sabine Pass Liquefaction Project (currently under construction) is expected to come online in early 2016 ahead of others and, because it is able to take advantage of additional cost savings from existing infrastructure and is supported by 20-year "take or pay" style sale and purchase agreements with investment grade offtakers, appears better positioned to weather the storm. In fact, Cheniere Energy is also in the process of seeking project financing for its US$12 billion Corpus Christi LNG Export Project. However, BG Group recently deferred a final investment decision for the ETE/Lake Charles LNG Project. Some suggest that the North American LNG development model needs to be reexamined. Smaller LNG projects, because they are more nimble – i.e. can quickly get to production and have lower capital costs – may become more prevalent.

While it is still too early to predict how long the price decline will persist, uncertainty is causing some investors and industry players to reassess investment decisions and others to envision opportunities in the midst of a changing landscape. Overall, we remain optimistic that the decline in energy prices has the potential to be an economic stimulus to the U.S. economy – in the form of increased disposable income in the hands of consumers and lower feedstock costs for other U.S. industries – and that overall U.S. economic growth should increase as a result of declining oil prices. We see a number of exciting developments and potential investment opportunities over the next year – particularly in (i) petrochemical projects, (ii) new gas-fired electric generation, and (iii) renewable energy.

*(i) Petrochemicals industry should inevitably benefit from declining oil prices*

First, petrochemical industries and fertilizers, which use natural gas, natural gas condensate and liquids, and/or crude oil or its derivatives as feedstock should, in many cases, benefit from declining oil prices. The analysis critically depends on the nature of the feedstock, the end product, competing supplies and global demand. Some industry experts are concerned that declining oil prices, by also making petrochemicals in Asia, the Middle East and Europe more competitive, could threaten to erode the competitive edge that the U.S. petrochemical industry has gained due to the shale gas boom, e.g. polyethelyene from natural-gas-derived ethane


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versus naptha-based processes elsewhere. Nevertheless, we believe that many U.S. petrochemical producers should continue to benefit from favourable margins. Further, developers continue to advance new petrochemical projects, including Ineos' and Sasol's US$420 million world-scale high-density polyethylene petrochemical plant, which broke ground in La Porte, Texas in December. Development activity remains robust for additional U.S. shale-based petrochemical projects including ethylene/polyethylene, methanol and fertilizer. The outlook for natural gas-to-liquids (gasoline and diesel fuel) projects does not look favourable as margins have been squeezed by declining crude oil prices and due to the dramatic increase in capital costs as a result of supply chain and labour cost pressures on the U.S. Gulf Coast.

*(ii) New gas-fired electric generation continues to replace coal-fired power plants and nuclear facilities*

Second, we should continue to see a regulatory push to de-carbonise the U.S.' electric supply if carbon emissions standards recently proposed by the United States Environmental Protection Agency ("EPA") for new and existing power plants become final in 2015. Litigation has already been filed to challenge the EPA's authority to issue the proposed rules, contrary to the traditional practice of filing once rules have been finalised. Although it is difficult to predict the scope or timing of the final carbon emissions standards, a strict regulatory burden is expected for coal-fired power plants, which could continue to increase demand for gas-fired power plants and lead to increased operating costs and capital expenditures as well as retirements and repowerings of coal-fired power plants. The EPA predicts that about 50 GW of retirements of coal generation could occur if the proposed carbon emissions standards go into effect.

Further, if the rules are adopted as currently proposed and are ultimately upheld by courts, some form of carbon capture and storage/sequestration ("CCS") would be required for all new coal and natural gas combined-cycle facilities that could usher in more projects like the landmark US$1 billion carbon capture/enhanced oil recovery Petra Nova Project in Fort Bend County, Texas. It should be noted that the long-run economics of recovery of $CO_2$ for enhanced oil recovery will necessarily be significantly impacted by future crude oil prices.

As a reflection of this trend, recent U.S. Energy Information Administration ("EIA") statistics illustrate a pronounced decline of net coal generation, with gas-fired electric generation taking the second biggest share of net generation (right behind coal). U.S. coal-fired electric generation peaked in 2007 at 2,016 TWh (terawatt-hours or million MWh), and declined to 1,514 TWh in 2012 before recovering somewhat over the past two years. Natural gas-fired electric generation has been increasing, unevenly, over the past decade, from 710 TWh in 2004 to a peak of 1,226 TWh in 2012 before easing slightly over the past two years. The recent increases of coal-fired power and declines of gas-fired power appear to be driven by short-term factors such as the cold winter experienced by the U.S. East Coast in 2014 and are not likely to persist.

It should also be noted that new gas-fired generation is in part reflecting the changing U.S. energy mix, with many new gas-fired projects involving fast-start simple-cycle combustion turbine facilities used to back up supplies of intermittent wind and solar energy, such as the 313 MW EIF Pio Pico Project in San Diego County, California, the 720 MW NRG Marsh Landing Project near Antioch, California and the 512 MW Bayonne Energy Center in Bayonne, New Jersey. There has also been significant development activity related to new base-load combined cycle generation, such as the 705 MW EIF Newark Energy Center in New Jersey, the 869 MW Oregon Energy Center in Oregon, Ohio and Footprint Power's 674 MW Salem Harbor in Salem, Massachusetts.

Private equity and infrastructure funds (e.g. EIF, ECP, LS Power, Highstar Capital and Arclight) continue to be a major source of capital for the development of new gas-fired electric generation in the U.S. Most of the activity has been in the more liquid power markets that also have experienced the most growth in demand since the recovery from the 2008 global financial crisis (e.g. Texas, PJM, MISO and California). LS Power, in particular, was involved in a number of acquisition financings last year, including the US$1.57 billion acquisition financing for six gas-fired generation facilities. In general, project finance lenders have increased their activity in the financing of quasi-merchant projects, with the typical greenfield project obtaining up to a five-year energy hedge to support operating margins, and with project debt being structured on a mini perm basis with aggressive amortisation during the five-year hedged period.

*(iii) Renewables continue to push the U.S. towards a lower carbon footprint*

Third, while the renewables industry, in particular wind and solar, may be facing headwinds due to declining natural gas and electricity market prices, the industry is nevertheless poised to become a significant force in the U.S. energy mix. According to recently released EIA statistics reflecting rolling 12-month data to November 2014, total non-hydroelectric renewable energy generation (i.e. wind, solar, biomass (all kinds) and geothermal) surpassed hydro power for the first time this past year (277.4 TWh and 257.6 TWh respectively).

Wind electric generation has seen massive development over the last decade (from 14.1 TWh in 2004 to 181.1 TWh in 2014). Notable projects for 2014 include the 200 MW Mesquite Creek wind farm in Borden and Dawson Counties, Texas, the 182 MW Panhandle 2 Wind Project in Carson County, Texas, the 150 MW Route 66 Wind Project in Carson and Armstrong Counties, Texas, the 16.2 MW Marsh Hill Wind Project in Steuben County, New York and the 211 MW Stephens Ranch Wind Project in Borden and Lynn Counties, Texas. While the Production Tax Credit (PTC) that expired in December 2014 stimulated this growth, there remains uncertainty about whether the PTC for wind will be extended beyond the current 2014 sunset date.

Solar electric generation is ramping up rapidly. Photovoltaic solar electric generation from utility-scale projects went from almost nothing to a substantial share in only seven years (from 0.016 TWh in 2007 to 15.7 TWh in 2014) and the solar industry in general is poised to eclipse oil-fired electric generation of all types. In addition to utility-scale solar projects, such as the 60 MW Regulus Solar Project in Kern County, California, there continues to be massive growth in commercial, industrial and residential solar installations, which grew 58% over Q3 2014, including the SoCore Solar Project, Sun Edison's LPT Portfolio Project, SunRun Resi-Solar Backleverage Project and Google/SunPower Corporation's agreement to invest in US$250 million residential solar power projects.

It should be noted that while regulatory policy (in particular, the PTC for wind, and the 30% Investment Tax Credit ("ITC") for solar, which extends through 2016 under existing regulations) has played a significant role in the dramatic growth of the renewables sector, it is internal forces such as (a) technological improvements leading to the dramatic decline in capital costs, and (b) innovative financing structures that are now important forces driving growth in the renewable sector. This is particularly true for solar. For example, advancements in distributed solar technology are having a profound effect on the solar industry. Further advances may depend on electricity storage technologies, including integration of the power generation and transportation sectors.

Increased demand, availability of tax credits and innovative financing vehicles specifically tailored for the renewables industry



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have dramatically reduced capital costs. Renewables developers are portfolio-financing, utilising securitisation structures (e.g. Solar City, SunEdison and SoCore) and yieldcos (publicly traded companies created to own and operate assets that generate a predictable cash flow) (e.g. NRG Yield, Abengoa Yield Plc, SunEdison's TerraForm Power Inc. and NextEra Energy Partners entered the market in 2014) in addition to tax equity financings (e.g. Mustang Solar Project and SunEdison Portfolio Financings). Mobilising tax equity for renewables projects remains a significant challenge as there is far more demand from renewables developers for tax equity than there is tax equity capacity in the market. As a result, tax equity negotiations are often more complex and time-consuming and the pool of active tax equity investors remains relatively small.

As renewable energy continues to make up a greater proportion of the energy mix, it is prompting a re-assessment of grids, the role of utilities, storage and consumption. Technological advances are enabling parts of the U.S. to move away from the traditional model of big power stations transmitting large amounts of power long distances to a more distributed model focused on local generation and local storage. As a result, utilities (at least in some jurisdictions, such as Hawaii and California) may be repositioned as coordinators of distributed energy sources (including demand-side response and storage). This new distributed generation/storage model poses a significant threat to the long-established electric utility business model, as customers may increasingly consider distributed models that enable customer choice in electing when to go "off the grid". New York State established a new initiative last April, Reforming the Energy Vision, to transform the way electricity is distributed and used in New York State, bringing us one step closer to making this vision a reality.

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

See question 1.1 above.

## 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 (the "UCC") provides a well-developed and predictable framework for lenders to take a security interest in the borrower's 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 borrower's personal property assets. Filing a UCC-1 describing the collateral in the appropriate filing office perfects the lender's security interest.

Perfection of rights in deposit accounts, money and letters of credit is achieved by control rather than by the filing of a UCC-1. Control in accounts is achieved by the lender (or its collateral agent) taking control of the deposit account under control and funding provisions in the security agreement or entering into an account control agreement.

Lenders usually also require a pledge of the ownership interests in the project company to give them the ability to own the project company (and all of its assets) in the event that they choose to foreclose.

### 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 may be taken over real property, subject to the real property laws of the state in which the real property is located, through a mortgage, deed of trust, leasehold mortgage or leasehold deed of trust. If under a certain state's law these instruments do not cover fixtures, a UCC-1 fixture filing may also be required.

To create a security interest in real property by mortgage or deed of trust, such instrument will: (i) identify the legal names of the lender and the borrower; (ii) state the amount of the debt owed by the borrower to the lender and identify the promissory note evidencing the indebtedness; (iii) contain a granting clause conveying the mortgage to the lender; (iv) describe the secured property; and (v) be signed and notarised. In most states, a security interest is perfected when the instrument is recorded in the recorder's office of the county where the real property is located.

### 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, a consent to collateral assignment by the project company to the lenders provides the lenders the right to collect receivables under an underlying assigned agreement.

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

Please see question 2.1 above.

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

Please see question 2.1 above.

### 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 real property will typically comprise a significant percentage of the debt obligations secured.

### 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.




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

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

## 3 Security Trustee

**3.1 Regardless of whether the USA 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?**

In New York law-governed security documents where there are at least two lenders, 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 the USA, 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?**

New York law recognises the concept of a security trust, although it is not typically used.

## 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?**

Regulatory approval varies greatly as such elements are dependent on the type of collateral involved. For example, a direct or indirect change in control over electric power assets subject to the jurisdiction of the Federal Energy Regulatory Commission-jurisdictional ("FERC") must be approved by FERC. FERC has jurisdiction over most sellers into wholesale electric markets and electric power transmission facilities in the contiguous U.S. states other than in the Electric Reliability Council of Texas ("ERCOT") region, which is subject to state jurisdiction. 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 hydro-electric 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 the possible imposition of (i) the automatic stay under the Federal bankruptcy code, title 11 of the United States Code (the "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.

**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.

## 5 Bankruptcy and Restructuring Proceedings

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

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

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,



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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 cram down 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 very limited circumstances, a debtor 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. 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, and (iii) the transfer enables the lender to receive more than it otherwise would have received in a liquidation of the project company. 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 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., from the category of entities that are eligible to be debtors in a bankruptcy case. 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 Uniform Commercial Code generally authorises a secured creditor, after default, to take possession of, to collect on, and to dispose of (such as by public or private sale), personal-property collateral without first commencing a court proceeding, provided that the secured creditor complies with particular formalities and proceeds without breach of the peace.

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

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

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

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, mining of coal, oil, oil shale and natural gas on land sold by the Federal government is permitted by U.S. citizens, corporations and other U.S. entities only. 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 coordinated by the




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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, 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 hydro-electric licence but may own or control a U.S. company that holds such a licence.

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

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

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

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

## 7 Government Approvals/Restrictions

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

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

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

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

The EPA governs the issuance of most Federal environmental permits. Additional environmental permitting can 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, FERC requires approval of issuances of securities or assumptions of liabilities (e.g. incurrence of debt), subject to certain exceptions, for companies subject to its electric power jurisdiction. FERC customarily grants electric power generators with MBR Authority blanket approval for jurisdictional financings, and the owners of qualifying facilities that are exempt from FERC rate regulation are also exempt from FERC regulation of financings.

Please refer to question 18.2 for SEC-related requirements.

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

Please see questions 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 and an excise tax is imposed on the sale of coal. 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 prohibited from engaging in transactions with individuals or entities that the Office of Foreign Assets Control of the U.S. Department of Treasury designates as individuals or entities owned or controlled by countries against which the United States has imposed sanctions or that the United States has designated as terrorists or narcotics traffickers.

### 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, there are no such generally applicable restrictions.



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**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 the USA or abroad?**

Apart from the withholding taxes discussed under question 17.1, 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 7(a) 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 governing environmental permitting for power projects. Permits related to air emissions and water discharges under these statutes and similar state laws may be required prior to the start of construction by the EPA or by state or local governmental authorities.

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 comprehensive environmental review under the National Environmental Policy Act. Some states, notably California, require separate state-level comprehensive environmental review of discretionary governmental actions relating to power project permitting and siting.

**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?**

Foreign workers employed by a project company within the United States are required 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 immediate family member who is a U.S. citizen.

## 10 Equipment Import Restrictions

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

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

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

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

## 11 *Force Majeure*

**11.1 Are *force majeure* exclusions available and enforceable?**

Yes, *force majeure* exclusions are available and enforceable and are applied such that one or both parties are excused from performance of the project agreement, in whole or in part, or are entitled to suspend performance or claim an extension of time for performance. Invocation of a *force majeure* clause can trigger *force majeure* across other related project agreements, and thus it is important to ensure that the *force majeure* provisions "mesh" with those found in related project agreements. Some *force majeure* provisions, however, typically will 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.





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## 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 Foreign Corrupt Practices Act of 1977 (the "FCPA") prohibits the bribery of foreign government officials. The law contains two sets of provisions: (i) it prohibits corrupt payments to officials and agents of foreign governments by U.S. persons; and (ii) it requires accounting practices to accurately reflect payments to foreign officials and agents.

Among other penalties, (i) the U.S. Department of Justice may impose criminal penalties of up to US$2 million against offending firms and fines of up to US$100,000 and imprisonment for up to five years for offending officers, directors, stockholders, employees and agents, and (ii) the Securities and Exchange Commission or the Attorney General may bring civil actions, which include penalties of up to US$10,000 for any firm, director, officer, employee or agent 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). It is very common that project agreements are governed by New York law.

**13.2 What law typically governs financing agreements?**

New York law typically governs financing documents since the commercial laws and legal precedents in the state of New York tend to be more settled than in other states, making lenders more comfortable. Security documents, such as the 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 question 13.1 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 the USA 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 is also party to (i) the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), which governs international arbitral awards where expressly agreed by the parties or where "a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified or acceded to the Panama Convention and are member States of the Organization of American States" only, and (ii) the International Convention on the Settlement of Investment Disputes (the "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 cases involving family law and criminal law are not arbitrable. However, claims under securities laws and Federal antitrust laws 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



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corporations that are treated as returns of capital) to foreign persons unless attributable to a branch office maintained by the recipient within the United States. The United States maintains treaties with numerous jurisdictions that reduce or eliminate these withholding taxes on amounts paid to qualified residents of the counterparty treaty country.

Even where there may be a treaty that reduces or eliminates withholding taxes on U.S. source interest, under the Foreign Account Tax Compliance ("FATCA"), interest paid and, beginning after December 31, 2016, the gross proceeds of a sale or other disposition of any loan that can produce U.S. source 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 or 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 and, beginning after December 31, 2016, the gross proceeds of a sale or other disposition of loans that can produce U.S. source interest paid, to a non-financial foreign entity (whether such non-financial foreign entity is a beneficial owner or an intermediary) unless such entity provides a certification (i) 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 to foreign investors or lenders.

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 the USA?

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 (the "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 U.S. Securities Exchange Commission (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 the USA.

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

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

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

A less commonly used structure is the *Sharikat Mahassa-Murabaha* structure. Under this structure, the borrower and the lenders enter into a joint venture (*Sharikat Mahassa*) agreement which is not disclosed to third parties. A *Murabaha* transaction is one in which



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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 a recent U.S. bankruptcy court case, *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 the USA? If so, what steps could be taken to mitigate this risk?**

Generally, no.

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He has represented international energy companies, project sponsors and financial investors (including banks, official credit agencies and underwriters) in connection with: the development, acquisition and financing of power projects ("IPPs"), upstream oil and gas, LNG, petrochemical, refinery, pipeline and other major energy projects; telecommunications projects including global satellite telecom, fibre optic networks and other telecom systems; natural resources, environmental facilities and transportation infrastructure projects; and others. His financing experience includes Rule 144A project bonds, securitisations, private equity funds, project leasing and other financing structures.

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Ms. King received her B.A. from Macalester College and her M.A., with *Distinction*, from the University of London: School of Oriental and African Studies. She earned her J.D. from the University of Virginia where she was a submissions review board member on the *Virginia Journal of International Law*. Prior to law school, she worked in international trade policy with the U.S. Department of Commerce.

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