ICLG

The International Comparative Legal Guide to:

Project Finance 2016

5th Edition

A practical cross-border insight into project finance

Published by Global Legal Group, with contributions from:

Advokatfirma Ræder DA
Ali Budiardjo, Nugroho, Reksodiputro
Angola Legal Circle Advogados (ALC Advogados)
BM&O Abogados – Attorneys at Law
Boga & Associates
Brigard & Urrutia Abogados
Camilleri Preziosi
Clayton Utz
CMS Reich-Rohrwig Hainz
Cuatrecasas, Gonçalves Pereira
Hammarström Puhakka Partners
Henriques, Rocha & Associados, Sociedade de Advogados, Lda
International Project Finance Association (IPFA)
Karimov and Partners Law Firm
Khan Corporate Law
Kyriakides Georgopoulos Law Firm
Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados
Milbank, Tweed, Hadley & McCloy LLP
Nagashima Ohno & Tsunematsu
Oraro & Company Advocates
Patton, Moreno & Asvat
Petrikić & Partneri AOD in cooperation with CMS Reich-Rohrwig Hainz
Philippi, Prietocarrizosa & Uría
Ploum Lodder Princen
PrimePartners Wirtschaftskanzlei
QUIROZ SANTRONI Abogados Consultores
Rodríguez Dávalos Abogados (Consultores en Energía RDA, S.C.)
Severgnini, Robiola, Grinberg & Tombeur
SJ Law, Advocates & Solicitors
Templars
The Legal Circle
Vieira de Almeida & Associados, Sociedade de Advogados, RL
Walder Wyss Ltd.

global legal group

Contributing Editor
John Dewar, Milbank, Tweed, Hadley & McCloy LLP

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Sales Support Manager
Toni Hayward

Sub Editor
Nicholas Catlin

Senior Editor
Rachel Williams

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
April 2016

ISBN 978-1-910083-89-5
ISSN 2048-688X

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

USA

Eric F. Silverman

Milbank, Tweed, Hadley & McCloy LLP

Simone M. King

1 Overview

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

As oil prices slipped below $27 a barrel in January – the lowest price since 2003 – and with the U.S. Department of Energy predicting U.S. crude to average $38.54 a barrel in 2016, increased US oil/gas production, coupled with weak global demand, proved to be a disruptive force and a contributing factor to excess supply and the further decline in oil and gas prices.

Oil and gas markets continue to experience great strain from depressed prices and excess supply that will likely persist in 2016. The U.S. Energy Information Administration (EIA) indicates that global inventory increased by 1.9 million b/d in 2015, marking the second consecutive year of inventory builds, and the EIA forecasts that the largest inventory builds will occur in the first half of 2016. EIA also noted that current values of futures and options continue to suggest high uncertainty in the price outlook. The impact of the price decline rippled through the entire energy value chain, but highly leveraged E&P companies were hit hardest. If the decline persists over the long-term, we expect to see more merger and acquisition activity and bankruptcies/restructurings in the industry. It is still too early to determine the impact that Iranian oil re-entering the market and U.S. Congress' abolishing the 40-year oil export ban in December will have on the energy market, excess supply and prices.

In 2015, we also witnessed: (i) electricity from natural gas surpassing coal for the first time for a period of several months (but not for the full year); (ii) further gains of renewable power in the energy mix; (iii) further efficiencies in energy generation and use due to continuing technical advancements; as well as (iv) a clear trend of tighter environmental regulation on power assets, particularly coal.

Nevertheless, different states and energy producers are experiencing the impact of these market trends differently. Many states and energy producers are embracing these changes as positive developments. However, there are some states and utilities, negatively impacted by these overarching industry shifts, that are making efforts to frustrate these forces in order to protect market share, preserve state tax revenue and retain high-paying jobs that they view as being threatened by cheap shale gas, new Federal regulation, more efficient plants and technological innovation. As a result, we witnessed a number of significant legal disputes in 2015 that, once resolved, will have a profound impact on energy generation and the demarcation between Federal and state authority. Significant economic and regulatory risk, coupled with this year being an election year, and an overlay of high geopolitical risk, will impact investment decisions throughout 2016. Those investors and industry players with a good understanding of these risks will be better able to navigate the uncertain energy landscape in 2016 and better position themselves once energy markets eventually stabilise.

I. Regulatory uncertainty and legal challenges will greatly impact the energy landscape

a. Clean Power Plan threatens coal-fired generators

In 2015, the Federal government made further attempts to tighten environmental regulations on power assets, particularly coal, through the Environmental Protection Agency's (EPA): (i) Mercury and Air Toxic Standards (MATS) requiring that coal-fired power plants adopt by April 2015 certain control technologies in order to limit the emissions of acid gases, toxic metals, and mercury; and (ii) Clean Power Plan (CPP), announced on August 3, 2015, mandating reductions in CO_2 gas emissions from existing power plants.

MATS and the CPP are expected to have a significant impact on generation asset values by driving energy price spreads and unit dispatch, especially in coal-intensive regions. EIA estimates that U.S. coal production declined by 109 million short tons (MMst) (11%) in 2015, which was the largest decline ever recorded. While the overall effect of MATS and the CPP on coal plant valuations will be negative, some predict that the variation will likely be driven by regional markets – coal plants in gas-intensive areas will decrease significantly compared with coal plants in coal-dominant regions. In response, some states and energy producers disproportionately impacted have initiated various manoeuvres to frustrate market forces by enacting protectionist policies and commencing legal challenges. In October 2015, a coalition of roughly 27 states, trade groups and companies filed a lawsuit in the D.C. Circuit Court of Appeals challenging the CPP. They argued that the rule is an abuse of Federal power and threatens the reliability of the energy grid. The lawsuit is viewed by some as an effort to protect local interests, retain jobs and prevent lost property and severance tax revenues, which for some states can be significant. For example, a 2012 University of Wyoming study found that, while coal mining employed about 1.8% of all workers in Wyoming, it generated about 11.2% of all government revenue. States, like Wyoming, have begun to seek other alternatives to generating revenue, such as placing a tax on wind generation. However, since there is no cost to wind itself, these states can only impose sales and property taxes on wind farms. The U.S. Court of Appeals of the District of Columbia Circuit will likely make a decision on the lawsuit this year.

These legal challenges notwithstanding, energy producers and investors are largely coming to the conclusion that the shift away from coal is inevitable. As a result, they are already starting to shut down legacy coal plants. During this transition period, we will continue to witness more coal-to-natural gas conversions – such as the 1,124 MW combined cycle electric generating facility called the Hummel Station Project to be built on the former site of the Sunbury Power Plant in Pennsylvania and owned by Panda Power Funds – as energy producers seek to take advantage of existing infrastructure, water supply, transmission lines and permits of existing coal plants. The Hummel Station Project is believed to be one of the largest coal-to-natural gas power conversion projects in the United States, and is just one example of this trend. Another example is Footprint Power Salem Harbor combined-cycle gas electric generating facility being constructed on the site of a Dominion Energy coal- and oil-fired plant in Massachusetts. Ultimately, material considerations will need to be given to not only what capacity will be captured by a new plant but, in the midst of regulatory uncertainty, a low-price environment and changing energy markets, what the value of that capacity will be over time.

b. Recent legal challenges to be decided this year will force the U.S. Supreme Court to play an important role in energy markets and the demarcation between Federal and state authority

In 2015, the U.S. Supreme Court agreed to hear a number of legal challenges relating to how the authority to regulate the price of electricity is apportioned between Federal and state government and the amount of deference yielded to Federal agencies. Traditionally, the Federal government, through the Federal Energy Regulatory Commission (FERC), was responsible for regulating prices in wholesale electricity markets (i.e., where electric power is produced and sold in interstate commerce) with regulation of retail electricity markets (i.e., where electric power is sold to consumers) left to the states. However, (i) states and FERC have increasingly been inserting themselves into both markets, and (ii) new technological advancements currently under way are greatly impacting the energy grid and altering how we use and pay for energy, that, in each case, further blur the line between the wholesale and retail markets.

The Supreme Court recently announced that it will rule on two (consolidated) Federal-state jurisdictional cases pitting Maryland regulators against FERC, while similar appeals are pending (as of press time) with respect to New Jersey regulators. New Jersey (via statute) and Maryland (via Public Service Commission Order) attempted to use their authority over retail utilities' purchases to address a perceived shortage of energy-generating facilities in their states, and potential reliability problems, by offering state-mandated 15-20 year contracts for differences to subsidise the new capacity development in their respective states. The costs of these subsidies would ultimately be passed on to the rate-payers. In both cases, the lower courts rejected the state-subsidised contracts, finding that the subsidies violated FERC's jurisdiction over wholesale energy markets, because the effect of the subsidies was not merely to protect against variability in wholesale prices but to "set" wholesale prices – a task that the Federal Power Act assigns to FERC exclusively. Even if the Supreme Court rules in favour of FERC, the question of whether states could offer other "non-FERC jurisdictional" incentives to achieve similar results for ratepayers, for example tax breaks to new developers, remains an open question.

In January 2016, the Supreme Court ruled on *Federal Energy Regulatory Commission v. Electric Power Supply Association et al.* The case was filed by a trade group, Electric Power Supply Association (EPSA), challenging FERC Order No. 745. FERC Order No. 745 was established to regulate an emerging electricity market mechanism called "demand response" (whereby an electricity customer temporarily reduces energy consumption when the real-time market price of electricity peaks in exchange for compensation). The FERC rule creates uniform rules to ensure that grid operators (i.e., the Regional Transmission Organizations (RTOs) and the Independent System Operators (ISOs)) compensate demand response equivalently to the way new electricity generation is compensated, so long as the demand response causes the overall cost of electricity to be less than if the retail customer had not acted. EPSA challenged the FERC rule on the basis that the rule effectively allows FERC to influence energy prices in the retail markets – a task reserved to the states. FERC argued that the rule was established as an effort to remove barriers to demand response participation and increase reliability and competitiveness of wholesale markets and thus is within their jurisdiction. According to FERC, any ruling against the FERC Order could create instability in organised markets such as PJM, where capacity auctions represent about 95% of total demand response revenue. In a 6-2 vote, the U.S. Supreme Court upheld the FERC order, finding that (i) the practices at issue (i.e., a market operator's payments for demand response commitments) directly affect wholesale rates, and (ii) although the practice inevitably also influences the retail market, the FERC rule does not intrude on a state's power to regulate retail sales. The Supreme Court concluded that the "contrary view would conflict with the FPA's [Federal Power Act] core purposes".

The case is significant because demand response has broad-ranging implications in the energy market. While demand response helps to prevent energy shortages and smooth out price fluctuations, it also provides retail customers with an incentive to change their energy consumption practices during peak demand periods (something they had limited incentive to do previously, as these customers were charged the same amount at all times for the amount of electricity consumed). The FERC rule has facilitated an influx of "demand response" companies like EnerNOC who provide software to big electricity consumers, primarily large companies, to help them manage their electricity use and shift their operations to take advantage of lower cost times to use energy. As such, the Supreme Court decision has wide-ranging implications for demand management, distributed energy and the Federal government's role in the energy markets.

Further, the decision will facilitate the transition the U.S. energy grid is currently undergoing and the momentous shift under way in how we use energy altogether. With the growing availability of distributed solar photovoltaic systems on rooftops and soon, batteries for energy storage, this is only one force in the inevitable trend toward a new distributed generation/storage model that would allow customers to increasingly consider distributed models that enable customer choice, including electing when to go "off the grid".

c. The global interconnectedness of energy grids and the upsurge in NAFTA Chapter 11 claims related to energy development is impacting how energy is sold and shipped across borders

As countries have grown more interconnected with more energy flowing across borders, North American Free Trade Agreement (NAFTA) Chapter 11 claims by foreign investors against states have become more prevalent. Certain estimates indicate that, while fewer than 50 cases were filed in the first three decades this mechanism has been available, investors launched at least 50 cases each year from 2011–2013 (and 42 in 2014). We see the investor-state dispute mechanism under Chapter 11 – a mechanism that allows investors to bypass a country's regulatory and court systems to sue foreign governments in arbitration and protect foreign investors from discrimination – as creating a new avenue for investors to assert claims regarding energy and related infrastructure development. We believe the rise of NAFTA Chapter 11 claims related to energy development will immensely impact how energy is sold and shipped across borders. Examples of recent claims are Canadian company TransCanada's filing of a notice of intent to assert a $15 billion

Chapter 11 NAFTA claim as a result of the U.S. administration's decision to deny a Presidential Permit for the Keystone XL Pipeline, and Mesa Power's $700 million NAFTA lawsuit against Ontario for damages for future losses related to their lost bids in wind power auctions in Ontario. Both cases are pending decision. We note that a similar dispute mechanism is contained in the Central America Free Trade Agreement and certain other bilateral free trade agreements with the U.S. We expect there will be more claims initiated against countries related to energy development over the coming years.

Additionally, global interconnectedness of energy grids is further facilitating energy development across borders. Mexico is currently undergoing a massive transition from fuel-oil to natural gas power generation. Since the country has difficulty accessing its own natural gas supplies due to the complexity of reserves and lack of infrastructure, U.S. natural gas supplies are a natural gas provider for Mexico's exploding demand for natural gas. In fact, since 2010, it is estimated that U.S. natural gas exports to Mexico doubled from 900 million cubic feet per day to two billion cubic feet per day. Nearly $20 billion in projects are in various stages of development. In June 2015, Mexico's state-owned power company *Comisión Federal de Electricidad* announced that it will tender 24 power projects covering major natural gas pipelines to electricity generation and distribution, worth an aggregate investment of approximately $9.8 billion, to connect its natural gas imports to Mexico's new gas-fired power plants. The $1.1 billion Waha natural gas pipeline projects running from Texas to the US/Mexico border and the $820 million project financing for the Laguna pipeline running from El Encino to La Laguna are evidence of this trend.

However, as more gas pipeline expansion projects come down the pike in the U.S. as part of an attempt to connect cheap abundant natural gas supply from the Marcellus and Utica shale plays to service growing demand centres, they are increasingly met by challenges from environmental groups and activists. These challenges have the potential to frustrate the siting process at FERC, which is charged with approving much of the nation's interstate pipeline infrastructure. Nevertheless, we expect to see more of these pipeline and gas-related projects on both sides of the border in the near future.

II. Further advances of renewables in the energy space will further drive energy price spreads

While the renewables industry continues to face headwinds from low oil and gas prices, we expect continued growth in the renewables industry, particularly wind and solar. While 2015 was a slow year for wind electric generation, with wind power generation in the U.S. falling 6% during the first half of 2015 despite an increase in wind generation capacity of 9%, we expect 2016 to be another breakout year for wind.

Many attribute the decline in wind generation to one of the strongest El Niño climate patterns in the last 50 years, which caused irregular wind patterns globally. During 2015, wind farms were operating around one-third capacity, although generation increased markedly in the last two months of the year. Across the Atlantic, the El Niño effect had an opposite impact on wind generation. London Array windfarm set a new record for the amount of clean electricity produced by an offshore wind farm in a single calendar month in December, generating approximately 369,000 MWh of electricity with a capacity factor of 78.9%, which some posit was at least partially due to the El Niño effect.

According to EIA estimates, Texas led the nation by far in the growth of new power generation from wind and natural gas, accounting for more than one-third of new wind and natural gas-fired power added to the nation's grid in 2015 through September. Notable wind projects in Texas include the 204 MW Shannon Wind Project in Clay County, Texas and the 300 MW South Plains II Wind Farm in Floyd County, Texas.

Growth in solar is expected to continue. EIA forecasts that utility-scale solar capacity will increase by 126% (13 GW) between the end of 2014 and the end of 2016, with 4.9 GW of new capacity being built in California.

It should be noted that regulatory policy will continue to play a significant role in the dramatic growth of the renewables sector. Congress' five-year extension of the Production Tax Credit (PTC) of $0.023/KWh for wind electricity generated to the power grid, and the solar 30% Investment Tax Credit (ITC), both subject to phase-out, will add a necessary level of predictability that should spur further investment in the sector.

We note that renewables are also playing a larger role in the energy mix in Latin American countries. In Chile, where energy prices are some of the highest in the world due to its reliance on energy imports, the increased demand for renewables generation is largely being driven by mining companies as a relatively cheap power supply source. Antofagasta indicates that it is now sourcing 20% of its power from wind turbines at its Los Pelambres mine. The Chilean government is also encouraging renewable energy with plans to make the country at least 20% reliant on renewables by 2025. Notable projects in Chile include the 104 MW Conejo Solar Project being developed by Pattern Energy Group LP in the Antofagasta region of Chile, the 146 MW Laberinto PV power plant in the Atacama desert (once constructed, it is predicted to be one of the largest merchant solar PV power plants in the world), the 53 MW Los Loros Solar PV Project in Copiapo, Chile and the 110 MW Quilapilún Solar Park in Santiago Chile. As other Latin American governments also announce similar plans and mandates (such as Peru's mandate that renewables should meet 5% of Peruvian power demand), renewables will continue to grab a greater market share of the energy mix in Latin America.

III. 2016 is shaping up to be another year of heightened geopolitical risk

Since 2010, emerging markets, particularly Brazil, Russia, India and China, have acted as a main driver of increased global demand and growth. For example, according to industry estimates, emerging market countries accounted for approximately 60% of the global growth from 2010 to 2014, and their share in global gross domestic product in 2015 was over 57%, measured in terms of international purchasing power parity. However, now that the bottom has fallen out of emerging markets and as oil and gas markets adjust to a lower price environment, geopolitical risks are heightened. Pressures placed on oil-dependent "petrostates" from the sharp decline in oil revenues have introduced additional volatility into energy markets and will adversely affect global economic growth. In countries like Russia, Venezuela, Nigeria and Iran where more than 50% of the national budget is tied to oil exports, international crude prices have to be above $100/bbl in order for governments to balance budgets and sustain government spending. As such, the current price environment is too low for these governments to financially support government programmes. Painful cutbacks are likely to lead to further civil unrest, already being triggered in some petrostates by rampant inflation, shortages of imported consumer goods and currency controls. In fact, Venezuelan President Nicolás Maduro recently issued a 60-day state of economic emergency to tackle the deepening economic crisis as the Venezuelan central bank released statistics showing that the economy contracted by 4.5% in the first nine months of last year and inflation soared to an annual rate of 141.5% during that same period. With Brazil facing political turmoil, corruption and deep recession, Russia stressed from collapsing oil and gas prices and China experiencing an extraordinarily difficult economic transition and financial market chaos, geopolitical risk has the potential to destabilise global energy and commodities markets.

However, it is not all doom and gloom for emerging markets. We anticipate that emerging-market growth will remain uneven as those markets struggle through global and domestic headwinds, while emerging market countries whose economies are not so tightly tied to commodities prices, like Mexico (where energy demand remains high) and India (a net commodity importer) should fare well during this transition period.

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

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

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

3 Security Trustee

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

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 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?

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 ("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, 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 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 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 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, 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 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 Environmental Protection Agency ("EPA") governs the issuance 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, 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. 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, there are no such generally applicable restrictions.

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?

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 that would impact 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 similar 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 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).

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.

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

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

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

16 Change of Law / Political Risk

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

Generally, no.

17 Tax

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

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

Even where an exemption may be available, under the Foreign Account Tax Compliance ("FATCA"), interest paid and, beginning after December 31, 2018, 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, 2018, 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 at 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 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 (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 your jurisdiction.

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

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

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

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

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 your jurisdiction? If so, what steps could be taken to mitigate this risk?

Generally, no.

Acknowledgment

The authors would like to thank Michael Kaufmann and James Liles for their assistance in preparing this chapter.

Eric F. Silverman

Milbank, Tweed, Hadley & McCloy LLP
28 Liberty Street
New York, NY 10005
USA

Tel: +1 212 530 5648
Email: esilverman@milbank.com
URL: www.milbank.com

Eric Silverman is a partner in the Global Project Finance Group. He was a founder and former chairman of the International Private Energy Association.

He has extensive experience in project development and financing of major energy, power and infrastructure projects in the U.S. and overseas. His experience includes representing multinational corporations, private equity funds and other project participants in greenfield projects and acquisitions/restructuring/recapitalisation transactions. He has also advised hedge funds, bondholders and other investors in connection with acquisitions and divestitures of infrastructure assets and distressed companies in the energy, telecoms and natural resources sectors.

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.

Simone M. King

Milbank, Tweed, Hadley & McCloy LLP
28 Liberty Street
New York, NY 10005
USA

Tel: +1 212 530 5145
Email: sking@milbank.com
URL: www.milbank.com

Simone King is an associate in the New York office of Milbank, Tweed, Hadley & McCloy and a member of the firm's Project Finance Group.

Ms. King's primary focus is on domestic and cross-border energy and infrastructure project and structured financings, acquisitions and investment transactions.

Her recent experience includes the representation of: the lenders in an approximately US$1.6 billion refinancing of U.S.-based global ports operator Carrix; LS Power in an approximately US$1.6 billion acquisition (and subsequent financing) of six natural gas-fired, combined-cycle power plants; tax-equity investor Google in connection with the financing of a wind project in Western Texas; the lenders in connection with the refinancing of a diverse portfolio of eight power plants held by NSG Holdings LLC; the purchasers and issuing banks in an approximately US$443 million private placement and US$47 million credit facility for the construction of the 313 MW EIF Pio Pico Project in San Diego County, California; and a sponsor consortium in a bid for the development and financing of a floating LNG regasification and storage unit to be located in Uruguay.

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.

Milbank

Milbank, Tweed, Hadley & McCloy LLP is an international law firm that provides a broad range of legal services to many of the world's leading commercial, financial and industrial enterprises, as well as to international institutions, individuals and governments. Project Finance is among our firm's core practice areas and our Global Project Finance Group comprises more than 100 dedicated attorneys, including 20 partners. We operate on an integrated basis with project finance teams in each of our offices in the U.S., São Paulo, London, Frankfurt, Beijing, Seoul, Singapore, Hong Kong and Tokyo.

From the largest petrochemical, power, mining and renewables project financings in the world to a global satellite project providing internet access to Africa, clients recognise Milbank's Project Finance Group as the leading choice for the financing and development of the most critical and pioneering infrastructure projects across the globe. Over the last three years, Milbank has closed more than 140 project financings, which have raised more than US$125 billion for infrastructure projects worldwide.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

glg global legal group

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

www.iclg.co.uk