



# Project Finance

in 45 jurisdictions worldwide

Contributing editors: E Waide Warner Jr and Gavin R Skene

# 2011



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### Project Finance 2010

Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910

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2010

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First published 2007,  
fourth edition 2010  
ISSN 1755-974X

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0870 897 3239

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<b>Global Overview</b> E Waide Warner Jr and Gavin R Skene <i>Davis Polk &amp; Wardwell LLP</i>	<b>3</b>
<b>AFRICA</b>	
<b>Democratic Republic of the Congo</b> Lambert S Djunga <i>Djunga &amp; Risasi</i>	<b>59</b>
<b>Morocco</b> Amin Hajji <i>Hajji &amp; Associés</i>	<b>150</b>
<b>Mozambique</b> Fernanda Lopes <i>Fernanda Lopes &amp; Associados – Advogados</i>	<b>156</b>
<b>Nigeria</b> Fred Onuobia and Toyin Odewole <i>G Elias &amp; Co</i>	<b>168</b>
<b>Sierra Leone</b> Samuel S Kargbo, Sylvia K Kalley and Millicent AO Hamilton-Hazeley <i>CLAS Legal</i>	<b>234</b>
<b>Tanzania</b> Sadock Dotto Magai <i>IMMMA Advocates</i>	<b>245</b>
<b>Tunisia</b> Achour Abdelmonêm <i>Achour Law Firm</i>	<b>256</b>
<b>Zambia</b> Mutale Kasonde and Robin Durairajah <i>Chibesakunda &amp; Co</i>	<b>296</b>
<b>AMERICAS</b>	
<b>Barbados</b> Diana Wilson Patrick and Alana Goodman Smith <i>Lex Caribbean</i>	<b>16</b>
<b>Brazil</b> Maria da Graça de Britto Vianna Pedretti, Fabrizio Sasdelli and Marcelo Cosac <i>Felsberg, Pedretti, Mannrich e Aidar Advogados Associados</i>	<b>28</b>
<b>Canada</b> Eric Belli-Bivar and others <i>Davis LLP</i>	<b>40</b>
<b>Chile</b> María Fernanda Carvajal and Juan Guillermo Levine <i>Carey y Cía</i>	<b>47</b>
<b>Colombia</b> Bernardo P Cárdenas M and Alejandra Pazos <i>Cárdenas &amp; Cárdenas Abogados</i>	<b>53</b>
<b>Mexico</b> Horacio M de Uriarte and María del Pilar Mata <i>Mijares, Angoitia, Cortés y Fuentes, SC</i>	<b>143</b>
<b>Panama</b> Erika Villarreal Zorita and Nadia de Halman <i>Anzola Robles &amp; Associates</i>	<b>180</b>
<b>Peru</b> Albert Forsyth <i>Jorge Avendaño · Forsyth &amp; Arbe Abogados</i>	<b>188</b>
<b>United States</b> Cynthia Urda Kassis, Robert N Freedman and Abigail Berry <i>Shearman &amp; Sterling LLP</i>	<b>267</b>
<b>Venezuela</b> Reinaldo Hellmund <i>Rodriguez &amp; Mendoza</i>	<b>283</b>
<b>ASIA-PACIFIC</b>	
<b>Australia</b> John Naughton, Catherine Beahan and Eloise Fardon <i>Mallesons Stephen Jaques</i>	<b>7</b>
<b>Cambodia</b> Martin Desautels, Rashed Idrees and Sambo Ly <i>DFDL Mekong</i>	<b>35</b>
<b>India</b> Sunil Seth, Vasanth Rajasekaran and Taru Gupta <i>Seth Dua &amp; Associates</i>	<b>103</b>
<b>Indonesia</b> Rahmat Soemadipradja, Robert Reid and Barryl Rolandi <i>Soemadipradja &amp; Taher</i>	<b>110</b>
<b>Japan</b> Naoaki Eguchi and others <i>Baker &amp; McKenzie GJB Tokyo Aoyama Aoki Koma Law Office</i>	<b>125</b>
<b>Laos</b> Walter Heiser, Daniel Noonan and William D Greenlee Jr <i>DFDL Mekong</i>	<b>137</b>
<b>Myanmar</b> James Finch, Soe Phone Myint and Saw Yu Win <i>Myanmar Thanlwin Legal Services Ltd (in association with DFDL Mekong)</i>	<b>161</b>
<b>Philippines</b> Roderico V Puno and Jonathan P Serrano <i>Puno &amp; Puno Law Offices</i>	<b>195</b>
<b>Thailand</b> Paniti Junhasavasdikul and Bundit Attakor <i>DFDL Mekong</i>	<b>250</b>
<b>Vietnam</b> Hoang Phong Anh <i>DFDL Mekong</i>	<b>290</b>
<b>EUROPE</b>	
<b>Belgium</b> Bram Delmotte <i>ALTIUS</i>	<b>22</b>
<b>England and Wales</b> Andrew Petry <i>Addleshaw Goddard LLP</i>	<b>63</b>
<b>Estonia</b> Lauri Liivat <i>Eversheds Ots &amp; Co</i>	<b>70</b>
<b>France</b> Jean-François Adelle <i>JantetAssociés</i>	<b>76</b>
<b>Germany</b> Adi Seffer and Jana Maettig <i>Heymann &amp; Partner</i>	<b>83</b>
<b>Greece</b> Tom Kyriakopoulos and Margarita Matsi <i>Kelemenis &amp; Co</i>	<b>89</b>
<b>Hungary</b> Zoltán Varga and Balázs Karsai <i>Nagy és Trócsányi</i>	<b>96</b>
<b>Poland</b> Barbara Olejniczak <i>Olejniczak &amp; Richardson</i>	<b>204</b>
<b>Romania</b> Francisc Eduard Peli and Alina Stancu-Birsan <i>PeliFilip</i>	<b>210</b>
<b>Russia</b> Elena Frolovskaya, Ilja Ratschkov and Stefan W Weber <i>Noerr OOO</i>	<b>217</b>
<b>Switzerland</b> Mark-Oliver Baumgarten <i>Staiger, Schwald &amp; Partner</i>	<b>239</b>
<b>Ukraine</b> Alexander Weigelt and Tatjana Khrystyuk <i>Noerr TOV</i>	<b>262</b>
<b>MIDDLE EAST</b>	
<b>Iran</b> Babak Namazi, Behnam Khatami and Farid Kani <i>Atieh Associates</i>	<b>119</b>
<b>Kazakhstan</b> Tatyana Suleyeva <i>Aequitas Law Firm</i>	<b>131</b>
<b>Oman</b> Marcus Pery <i>Al Busaidy, Mansoor Jamal &amp; Co</i>	<b>174</b>
<b>Saudi Arabia</b> Abdulaziz Al-Abduljabbar, Mohamed Hamra-Krouha, Ose Asemota and Dr Fahad Abuhimied <i>Al-Jadaan &amp; Partners Law Firm</i>	<b>225</b>
<b>Uzbekistan</b> Sofia Shaykhrazyeva and Atabek Sharipov <i>GRATA Law Firm</i>	<b>275</b>

# Laos

Walter Heiser, Daniel Noonan and William D Greenlee Jr

DFDL Mekong

## 1 Collateral

What types of collateral are available?

The types of collateral available for secured transactions, including those used in a project finance setting, are set out in the Secured Transactions Law. This provides for three forms of security pursuant to contract: security over moveable property; security over immoveable property; and security by another person or legal entity (ie, guarantee).

The following types of moveable property are available as collateral: material/tangible items; documents certifying a right of ownership such as share certificates and bonds; goods in a warehouse; intangible assets such as shares in a company; intellectual property; bank saving accounts; contractual rights; receivables; benefits under an approval; permission to conduct business operations; and future assets or gains. Land and buildings are the types of immoveable property that are available as collateral. Security by a third-party guarantor is also provided for under the Secured Transactions Law.

The Contract and Tort Law also contains provisions affecting contracts generally, including secured transactions. The leasing of equipment and other assets is also contemplated by the Contract Law.

## 2 Perfection and priority

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

A security interest over any type of collateral is perfected when it is registered at the State Assets Management Department (SAMD), or, in the case of immoveable property, at the Land Management Authority (LMA) where the property is located, provided that the following conditions are met: the debtor and creditor have entered into a security agreement in which the value of the secured assets is precisely defined; the security agreement is signed in the presence of three witnesses, in the case of a security agreement relating to immoveable property; and, the security agreement is notarised at the Lao Notary Office. The stipulated fees for the notarisation and registration of a security agreement must be paid. The notarisation process requires a full Lao language translation. The registration process requires either a Lao language summary or full translation. Although the Decree on Document Registration requires registration of all contracts with the SAMD, in practice only the LMA will register contracts relating to immoveable assets/land.

Perfection grants the secured party a first priority security interest over the collateral set out in the security agreement over all unsecured claims, unregistered security interests and subsequent registered security interests. However, perfection does not absolutely guarantee that a security interest remains enforceable in the case of the debtor's

bankruptcy. Note also that security interests granted by law (eg, tax and wage claims) have priority over security interests pursuant to contract.

It is standard practice in large infrastructure financings in Laos for an onshore agent or trustee to hold collateral as the secured party on behalf of the project lenders.

## 3 Existing liens

How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Security interests over immoveable property (ie, land) are often indicated on the back of the land title certificate for such property, provided that the security interest has been properly registered with the appropriate LMA. A review of the land title certificate relating to the property in question should provide some assurance to a creditor as to the absence of competing liens.

Security interests over all other types of property must be registered with the SAMD. A creditor can attempt to determine the absence of liens with priority to that creditor's lien by consulting the records at the SAMD. However, in practice, the SAMD has limited capacity to ensure accurate records. The SAMD security registry is not well maintained, centralised, or electronic, and it is not indexed in a readily accessible manner, such as by the debtor's name.

## 4 Enforcement of collateral

Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

The implementing decree presently applied to secured transactions requires that advance written enforcement notice be provided to the party providing such pledge or guarantee. An enforcement notice must be given 60 days in advance in the case of immoveable assets and 30 days in advance in the case of all other security. Per the Secured Transactions Law, in the case of guarantees, the creditor must make prior demand to the debtor before enforcing the guarantee.

Self-help remedies are not prohibited, provided that no law is violated in the exercise of the self-help remedy. Foreclosure by public auction, sale by the creditor or purchase by the creditor (upon paying the debtor any excess in value over the outstanding principal and interest) are remedies authorised by the Secured Transactions Law but are not stated to be the exclusive remedies. No judicial sale is required. While Lao law technically requires the use of the Lao kip in transactions (as discussed in question 6), in practice many transactions are denominated or valued in foreign currency.

## 5 Bankruptcy proceeding

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 collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

The Law on Bankruptcy applies to all insolvent enterprises located or conducting business in Laos. General bankruptcy rules apply to both state and private companies. There are no extra-judicial processes specifically authorised for the seizure of business assets. Where a company is dissolved as a result of bankruptcy, a liquidator must be appointed by the courts.

Secured creditors may obtain a court order to enforce their rights, but this is not a requirement. Self-enforcement is possible if agreed by the parties in the governing security agreement.

During the supervision phase of bankruptcy proceedings, creditors representing one-quarter of the total debt may convene a creditors' meeting to resolve the financial problems of the enterprise. A valid resolution of a creditors' meeting requires the vote of creditors representing at least two-thirds of the total debt. No special rights, remedies or priorities are available to the claims of foreigner investors or creditors under Lao insolvency procedures.

## 6 Foreign exchange

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Foreign exchange transactions are governed by the Decree regarding the Management of Exchange Control and Precious Metal (the FX Decree). The FX Decree prohibits individuals and legal entities operating in Laos from directly paying or receiving foreign exchange for the goods and services rendered to them or by them, or from settling debts in foreign exchange within Laos, without approval from the Bank of Lao PDR (BOL). The FX Decree further provides that foreign exchange can be used for specified purposes only, including payment for import-export related services, repayment of foreign debts under a BOL-approved loan agreement, and repatriation or transfer of profits, dividends, capital, interest, or salaries by foreign investors to a third country, provided that such use is compliant with regulations issued by the BOL. Special fees or taxes are not imposed on foreign exchange transactions.

## 7 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or loan payments to parties in other jurisdictions?

Foreign investors may remit profits provided that, for example, tax and wage obligations have been paid and the Registered Capital (stated share capital) of the foreign-invested company has been fully paid-in. Per the Enterprise Law, no dividends may be distributed if accumulated losses exist. The Registered Capital may not be reduced unless notice has been provided to all creditors and any objecting creditor has been repaid in full. 10 per cent of the annual net profits are required to be set aside in a reserve fund until such time as the reserve fund has accumulated an amount equal to 50 per cent of the Registered Capital. The FX Decree permits the use of foreign currency for the repayment of BOL-approved offshore loans. However, capital to be repatriated may not exceed the capital brought into Laos as evidenced by a capital importation certificate issued by the BOL. Expatriate employees are also free to remit funds provided that taxes and debts are not in arrears. Income from dividends, profits from the sale of shares, and interest from loans are subject to a withholding tax of 10 per cent.

## 8 Repatriation

Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

Project companies are not required to repatriate foreign earnings.

## 9 Offshore and foreign currency accounts

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Project companies may open a foreign currency account in Laos. Offshore bank accounts are permitted, provided that BOL approval is obtained.

## 10 Foreign investment and ownership restrictions

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

There are several restrictions that apply to foreign investment in or ownership of a project and related companies. The Investment Promotion Law requires enterprises carrying out a project that requires a concession to maintain registered capital (stated share capital) equal to not less than 30 per cent of total capital.

Total capital is equal to the registered capital plus long-term debt plus other equity (retained earnings and additional paid-in capital), where 'long-term debt' is debt not payable within the current 12-month reporting period. This restriction sets a maximum debt-to-equity ratio of 70:30 for companies that engage in a concession activity. Further, the assets of the company must at all times equal or exceed the registered capital.

The Land Law prohibits foreign ownership of land (whether in the form of 'land use rights' or usufruct) in Laos. Foreign-invested companies are limited to leasing land or receiving concessions of land from the state. The maximum lease term from a private Lao party may not exceed 30 years; the maximum lease term from the government may not exceed 50 years (in each case subject to possible later extension upon government approval). Concession periods are limited to 50 years, but can be extended on a case-by-case basis by the government. In the case of a lease or concession of land exceeding 10,000 hectares, National Assembly approval is required. All security interests in immovable assets relating to a lease of land or a concession of land from the state must be registered with the LMA where the land in question is located. In the event of foreclosure, a transfer of ownership in immovable assets relating to a lease of land or a concession of land from the state must also be registered with the relevant LMA.

Government equity participation is required in certain industry sectors – notably the electricity and mining sectors. The government equity percentage will be the subject of negotiation.

Laos has entered into a number of investment treaties or agreements with various countries (Thailand, for example) but these treaties do not afford relief from the particular restrictions described above. An overview of taxes applicable to foreign investors operating in Laos is set out in question 17.

## 11 Documentation formalities

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?

All contracts must be registered with the SAMD to be enforceable in Laos. In the case of immovable property including leases and



pledges of immovable assets, the contract must be registered at the LMA where the property is located. Security agreements relating to immovable assets must be signed in the presence of three witnesses. Leases and all security agreements (pledges of immovable assets, moveable assets and guarantees) must be notarised at the Lao Notary Office. Notarisation of other contracts is recommended to facilitate enforcement by the Lao courts as a 'true and correct' document but is not mandatory. The notarisation process requires a full Lao language translation. The registration process requires either a Lao language summary or full translation. Although the Decree on Document Registration requires registration of all contracts with the SAMD, in practice only the LMA will register contracts relating to immovable assets/land.

## 12 Government approvals

What government approvals are required for typical project finance transactions? What fees and other charges apply?

The government approvals required for a project finance transaction will vary depending on the sector concerned. Generally project companies must obtain approval for the following activities: use of International Financial Reporting Standards; the use of offshore bank accounts, foreign-source loans and foreign exchange activities; water source development activities; construction works; forestry activities; the import, possession and use of wood processing and wood exploitation machinery; the displacement of aquatic animals and wildlife; the use of land for industrial purposes; factory establishment; and mining, exploration and survey activities. If the relevant statute does not provide the relevant ministry with exemption authority, any exemption from the statutory provision must be obtained via a resolution of the National Assembly or National Assembly Standing Committee.

With the limited exception of a form of joint venture (a business cooperation by contract) allowed under the Investment Promotion Law, a Lao project company must be established for any project in Laos. The Investment Promotion Law issued in mid-2009 merges the domestic investment regime and the foreign investment regime, replacing both the Domestic Investment Law and the Foreign Investment Law. Under the Investment Promotion Law (which is in the process of implementation) the investment licence, business operating licence (BOL) and tax registration certificate (TRC) will be incorporated into the enterprise registration certificate (ERC). At present, however, the following approvals are required:

- investment licence from the Investment Promotion Department, Ministry of Planning and Investment (IPD);
- approval of the company's articles of association by the IPD;
- approval of enterprise name and issuance of an ERC from the Ministry of Industry and Commerce;
- tax registration certificate from the tax department of the Ministry of Finance;
- company seal from the Ministry of Security;
- capital importation certificate from the Bank of Lao PDR; and
- company sign from the Ministry of Information and Culture; and
- BOL from the relevant ministry.

Other downstream licences and approvals will also be required. Administrative fees are imposed by government departments for the issuance of licences and approvals.

## 13 Foreign insurance

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Companies seeking insurance coverage for individuals residing in, assets located in or risks occurring in Laos must contract with

Lao-licensed insurance companies. Reinsurance is not addressed in the Lao laws. In practice, as reinsurance is generally required by creditors, and given the limited capacity of Lao insurance companies to provide coverage for large-scale projects, project companies frequently seek an exemption from the requirement of insuring only with Lao-licensed companies.

## 14 Foreign employee restrictions

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

The Labour Law places restrictions on the number of foreign employees that companies can employ. The general rule is that foreign employees who engage in unskilled labour may not exceed 10 per cent of the total workforce, while employees engaged in skilled labour may not exceed 20 per cent of the total workforce. Temporary exemption from these restrictions may be granted by the Ministry of Labour and Social Welfare. Foreign investors and foreign employees of project companies established in Laos are entitled to multiple-entry business visas.

## 15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

Foreign investment enterprises wishing to import raw materials, equipment, machinery, and vehicles must include a projection of their importation requirements in their application for a foreign investment licence. Once the investment licence has been approved, foreign invested enterprises are to adopt an annual importation plan for DIP approval. Duties and import restrictions are imposed on certain products, and import permits are required in some cases.

## 16 Nationalisation and expropriation

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

The Lao Constitution protects the legal capital and property of investors from expropriation and nationalisation by the state. However, a number of Lao laws authorise expropriation, nationalisation or seizure of private assets in specified cases. For example, the Investment Promotion Law protects the assets and investments of foreign investors against seizure, confiscation or nationalisation, subject to the exception of necessity for a public purpose, in which case compensation is to be provided. The Contract Law provides that breach of a contract may result in confiscation by the government of the contracting party's assets. The Land Law provides that land-use rights may be requisitioned by the state for public purposes, upon payment of appropriate compensation. The Electricity Law authorises the state to nationalise property of an owner or operator of an electricity enterprise for violations of the law.

## 17 Fiscal treatment of foreign investment

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?

Foreign-invested companies may be eligible for tax incentives. Such incentives include limited profit tax holidays, exemptions from import duties and taxes on equipment and vehicles used in production, exemptions from import duties and taxes on raw materials which do not exist domestically, exemptions on semi-finished products imported for processing or assembly for the purpose of export and exemptions from export duties on export products. Enterprises engaging in certain promoted activities or investment projects located in certain geographic areas may be eligible for incentives under the

Investment Promotion Law. The relevant government authorities will review the investment activity and must grant approval before an enterprise can receive any incentives.

Additional tax incentives may be granted by the government in the concession agreement for the infrastructure project, but these will require ratification by the National Assembly or National Assembly Standing Committee.

### 18 Government authorities

What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The government agencies with authority over projects include: the Prime Minister's Office; the Ministry of Planning and Investment; the Ministry of Energy and Mines; the Ministry of Agriculture and Forestry; the Ministry of Industry and Commerce; the Ministry of Public Works and Transport; the Ministry of Finance; the BOL; and the Water Resources and Environmental Agency.

The Ministry of Finance is the designated representative of the government in projects with mixed public and private ownership, however, there are several state-owned enterprises that commonly hold shares on behalf of the Ministry of Finance in project companies in Laos: Electricité du Laos (power generation and transmission); Lao Holding State Enterprise (power generation and transmission); Enterprise of Telecommunications Lao (telecommunications); and Lao-Asia Telecom (telecommunications). The Ministry of Finance may also hold shares directly in project companies in certain sectors, such as in the mining sector.

### 19 International arbitration

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Lao law does not prohibit the choice of foreign arbitration as a dispute resolution mechanism; however, we are not aware if foreign arbitration clauses have been addressed by the Lao courts and there is no precedent of any enforcement of a foreign arbitration award in Laos. Laos is a party to the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), but its implementation under Lao law is uncertain, although seemingly recognised by subsequent legislation on the matter of foreign arbitration adopted by the National Assembly. The government has generally accepted the use of the UNCITRAL arbitration rules in its contracts with foreign-invested parties, with Singapore regarded as an acceptable 'neutral' venue.

The Investment Promotion Law allows parties to a dispute to resort to the Office for Economic Dispute Resolution for dispute resolution. This form of dispute resolution is not mandatory.

### 20 Applicable law

Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Project documents, such as concession agreements, domestic power purchase agreements and construction contracts between the project company and domestic Lao companies, and the articles of association of the project company are generally governed by Lao law. Security documents (including pledges of immovable and moveable assets and guarantees) that are to be enforced in the Lao courts must also be governed by Lao law. All other documents, including shareholders' or joint venture agreements, financing documents, offshore

security agreements and project documents between the project company and a foreign company, such as power purchase agreements for export, engineering procurement construction contracts, operation and maintenance agreements, consulting agreements, etc, are generally governed by foreign law. The laws of England are the most commonly chosen governing foreign law. Thai off-takers of electric power will insist on the use of Thai law.

### 21 Jurisdiction and waiver of immunity

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Lao courts and administrative bodies with enforcement capacity are not required by law or any treaty to honour, enforce or implement a foreign court judgment order. Laos is not a party to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (The Hague 1971). The Law on Civil Procedure provides for the recognition of foreign court judgments under certain conditions:

- there is a relevant treaty requiring such enforcement in place;
- there is an official Lao translation of the judgment;
- the foreign judgment does not conflict with Lao law; and
- the foreign judgment does not adversely affect the sovereignty of Laos.

In addition, the Judgment Enforcement Law states that foreign court judgments shall be endorsed by a Lao court and enforcement shall only be by proper order of such Lao court. Under the circumstances, it seems highly unlikely that a judgment of a foreign court would be enforced in Laos without complete retrial or retrial of the major issues, in the absence of a treaty to the contrary.

A waiver of sovereign immunity by the government should be effective and enforceable provided that the contract in question is commercial in nature.

### 22 Title to natural resources

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The Lao Constitution provides that all land is under the ownership of the national community (ie, the state). Natural resources on or under such land are also state property. Physical sources of electrical energy, and mineral resources (whether surface, underground or under water), natural forests and forest land are likewise state property. The rights and obligations of foreign investors to such natural resources must be set out in an agreement with the government – generally a concession agreement.

### 23 Royalties on the extraction of natural resources

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The specific royalties and taxes payable in connection with the extraction of natural resources are not specified in Lao law, but are generally provided for in the concession agreement negotiated with the government. Such royalties and taxes are typically revenue-based, rather than profit-based.

### 24 Export of natural resources

What restrictions, fees or taxes exist on the export of natural resources?

The export of natural resources is subject to controls, which vary by sector. For example, electric power must be transmitted through the national electricity transmission grid, limiting the ability of a project company to export electricity. In the mining sector, the government

**Update and trends**

Laos does not appear to have been significantly affected by the global financial crisis. Equity investors in Lao projects have been largely from countries less affected by the crisis: China, Thailand, Korea, France, Australia and Vietnam – participation by US and UK companies to date has been limited. Private investment in infrastructure in Laos slowed little during the global financial crisis and is expected to increase.

The recently promulgated Investment Promotion Law has reduced rather than increased the investment incentives available to foreign

investors. The rationale for this cutback in incentives was to create a level playing field for domestic investors and companies.

The government is in the process of establishing a Lao stock and bond exchange targeted for implementation by year-end 2010. Certain state-owned companies – including the power generation division of Electricité du Laos and Banque pour le Commerce Extérieur Lao – are to be listed.

periodically issues lists of minerals that are protected and restricted from export without approval of the Ministry of Industry and Handicrafts. All lumber exports require government approval.

Enterprises established under the Investment Promotion Law may be entitled to tax incentives as discussed in question 17, and may be entitled to an exemption from export duties.

**25 Environmental, health and safety laws**

What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

The Environmental Protection Law establishes the framework for the preservation and sustainable management of environmental resources in Laos. The Regulation on Environmental Impact Assessment and its corresponding guidelines detail mandatory requirements regarding the environmental impact assessment (EIA) to be conducted, and the environmental management plans to be adopted, by project companies. The EIA must comply with criteria specified by the Ministry of Industry and Handicrafts. These laws and regulations are administered by the Water Resources and Environmental Agency (WREA).

The Labour Law sets out health and safety obligations applicable to all project companies. The Labour Law is administered by the Labour Management Authority within the Ministry of Labour and Social Welfare.

**26 Project companies**

What are the principal business structures of project companies?  
What are the principal sources of financing available to project companies?

Under Lao law, a licensed Lao single-purpose company must be established to engage in the development, construction, financing and operation of the project. Project companies are most commonly organised as limited liability companies, with foreign, local, and state-owned companies being shareholders. The shareholders are liable for their subscribed registered capital (stated capital) but not for the general

liabilities of the limited company. Debt capital is available to project companies operating in Laos in the form of conventional bank loans, non-bank loans from private capital sources and sovereign wealth funds, and loans from international financial institutions.

**27 Public-private partnership legislation**

Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Government equity participation is required in the mining sector (per the Mining Law) and is generally demanded by the government in the Concession Agreement negotiation process in the electricity and telecommunications sectors. The government equity percentage will be the subject of negotiation. Although the Law on Telecommunications states that the government encourages local and foreign investors to compete and to cooperate in investment in the construction, development, and expansion of the telecommunications network and services in accordance with the systems prescribed by the government, to date the government has been protective of those telecommunications companies holding existing licences.

The Ministry of Finance is the designated representative of the government in such public-private ownership projects but there are several state-owned enterprises that commonly hold shares on behalf of the Ministry of Finance in project companies in Laos: Electricité du Laos (power generation and transmission); Lao Holding State Enterprise (power generation and transmission); Enterprise of Telecommunications Lao (telecommunications); and Lao-Asia Telecom (telecommunications). The Ministry of Finance may also hold shares directly in project companies in certain sectors, such as in the mining sector.

**28 PPP – limitations**

What, if any, are the practical and legal limitations on PPP transactions?

While the Secured Transactions Law permits state companies (initial 100 per cent direct government ownership with sell-down to 49.9 per



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cent permitted) and mixed companies (formed with 50 per cent direct government ownership) to use their assets as collateral for a foreign loan, approval from the government is required for the term or length of the security interest over land owned by the relevant state enterprise. Such approval is delegated to the minister of finance as per the Law on State Assets. In addition, where an asset to be assigned or pledged is directly held by the government or a company having any percentage of direct government ownership, the Decree on the Management of the Enterprise Invested by the State requires the approval of the minister of finance (or National Assembly approval in the case of assets of undefined high value or extent). The ability of the government to pledge its directly held assets (including shares in project companies with partial government ownership or accounts payable by such project companies (eg, taxes and royalties) may also be limited by existing government commitments in connection with outstanding government or project debt.

## 29 PPP – transactions

What have been the most significant PPP transactions completed to date in your jurisdiction?

The most significant transactions are:

- Nam Theun 2 Hydropower (US\$1.3 billion);
- Nam Theun 1 Hydropower (US\$750 million);
- Nam Ngum 2 Hydropower (US\$700 million);
- Nam Ngum 3 Hydropower (US\$550 million);
- Theun-Hinboun Hydropower (US\$650 million);
- Sepon Gold and Copper Project (US\$300 million);
- Nam Lik 1-2 Hydropower (US\$150 million);
- Phu Bia Mining Project; and
- ST Telemedia (Singapore) Lao telecommunications acquisition ((US\$200 million).





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