



Project Finance

in 45 jurisdictions worldwide

Contributing editors: E Waide Warner Jr and Gavin R Skene

2011



Published by
Getting the Deal Through
in association with:

Achour Law Firm
Addleshaw Goddard LLP
Aequitas Law Firm
Al Busaidy, Mansoor Jamal & Co
Al-Jadaan & Partners Law Firm
ALTIUS
Anzola Robles & Associates
Atieh Associates
Baker & McKenzie GJB Tokyo Aoyama Aoki Koma Law Office
Cárdenas & Cárdenas Abogados
Carey y Cía
Chibesakunda & Co
CLAS Legal
Davis LLP
Davis Polk & Wardwell LLP
DFDL Mekong
Djunga & Risasi
Eversheds Ots & Co
Felsberg Pedretti Mannrich e Aídar Advogados
Fernanda Lopes & Asociados – Advogados
G Elias & Co
GRATA Law Firm
Hajji & Associés
Heymann & Partner
IMMMA Advocates
JeantetAssociés
Jorge Avendaño · Forsyth & Arbe Abogados
Kelemenis & Co
Lex Caribbean
Mallesons Stephen Jaques
Mijares, Angoitia, Cortés y Fuentes, SC
Myanmar Thanlwin Legal Services Ltd
(in association with DFDL Mekong)
Nagy és Trócsányi
Noerr OOO
Noerr TOV
Olejniczak & Richardson
PeliFilip
Puno & Puno Law Offices
Rodriguez & Mendoza
Seth Dua & Associates
Shearman & Sterling LLP
Soemadipradja & Taher
Staiger, Schwald & Partner



Project Finance 2011

Contributing editors: E Waide Warner Jr and Gavin R Skene, Davis Polk & Wardwell LLP

Business development manager
Joseph Samuel

Marketing managers

Alan Lee
George Ingledew
Robyn Hetherington
Dan White
Sarah Walsh
Ellie Notley

Marketing assistant

Alice Hazard

Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Nina Nowak

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Senior subeditor

Kathryn Smuland

Production editor

John Harris

Subeditors

Chloe Harries
Sara Davies

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

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

© Law Business Research Ltd
2010

No photocopying: copyright
licences do not apply.

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

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of September 2010, be advised that this is a developing area.

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

Law

Business

Research

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

Thailand

Paniti Junhasavasdikul and Bundit Attakor

DFDL Mekong

1 Collateral

What types of collateral are available?

Thailand's Civil and Commercial Code governs, *inter alia*, property, the borrowing and lending of money as well as guarantees (suretyship), pledges, mortgages and rights assignments.

The common law concepts of consideration, trusts and equity do not exist in the Thai legal framework. Furthermore, the central security mechanism over common law company assets, the floating charge, is not used. As in other jurisdictions, however, lenders have used a number of imaginative and often complex arrangements to address the need for security under Thai law.

In principle, any asset can be used as collateral. The following are the most common assets that are used as collateral to obtain finance for projects:

- land (freehold land and land with an official deed granting possession rights), buildings, factories, plants, machinery, waterborne vessels whose deadweight is five tonnes (or over) and floating houses. These assets can be encumbered through the mortgaging process;
- shares, stock (warehouse warrants), bills, and moveable properties. These assets can be encumbered through the pledging process; and
- leaseholds on land, proprietary rights to copyrights, patents, trademarks and service marks. These assets can be encumbered through the pledging process.

Other collateral could take the form of an undertaking or assignment:

- guarantee – this can take the form of a guarantee by the project company's parent company, the project sponsors or a third party; and
- assignment of rights – this will take the form of an agreement between the lender and the borrower so that the lender will be entitled to receive receivables from the project company's customers (factoring arrangement) or receive compensation from the insurers who insure the project work.

In addition, creditors may introduce the following risk mitigation measures to assure themselves that the project financing achieves its objectives:

- inter-creditor/security agreement to ensure the adequate and timely flow of advances from the project lender;
- require project sponsors or shareholders to provide additional funding support to alleviate cash deficiency and cost overruns;
- require the project company to secure revenue flow through a 'product off-take agreement' with the product buyers to ensure the project company's ability to pay the repayment and interest on the loan;
- cash control arrangements – this arrangement aims to monitor and control the project company's cashflow through lender-controlled accounts; and

- taking custody of important documents – to prevent the debtor from encumbering its assets, the creditor or the project company or its agent would assume custody of important documents such as a concession, share certificates, land title deeds and machinery registration certificates (if not encumbered as loan collateral).

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 mortgage registration will be complete only upon payment of the full official registration fee required.

To perfect a mortgage on land and buildings, official registration fees at a rate of 1 per cent of the mortgage amount must be paid.

The rate of the official registration fee payable upon the mortgage of machinery is 1 baht per 1,000 baht or a fraction of the mortgage amount with the maximum amount payable being 100,000 baht.

Instruments representing a pledge of property are subject to stamp duty at the rate of 1 baht for every 2,000 baht or a fraction of the debt amount.

The law requires the calculation of fees, taxes, charges and duties payable at each respective rate based on the amount of debt that requires security.

The concept of a 'security agent' does exist and is enforceable. Any corporate entity, in the capacity of an agent or trustee, may hold collateral on behalf of the project lenders as the secured party.

Perfecting a mortgage

The Civil and Commercial Code requires that a mortgage be made in writing, duly executed by the parties to the mortgage and registered with the competent official, namely:

- a real estate mortgage must be registered with the land office that has jurisdiction over the location of the land concerned;
- a mortgage of a plant and equipment must be registered with the Department of Industrial Works; and
- a mortgage of ships or floating houses must be registered at the marine port of the registry concerned or the Marine Department.

The mortgage registration fee is 1 per cent of the debt amount. Stamp duty is 0.1 per cent of the debt amount. Failure to pay the registration fee and stamp duty will render the registration incomplete.

Upon mortgage registration, the creditor will have a preferential lien against the encumbered assets. However, the creditor's lien is subordinated to tax and wage claims.

Perfecting a pledge

The Civil and Commercial Code requires the project company to deliver the asset intending to be pledged to the lender as security for performance of an obligation. There are certain exceptions to this rule, namely:

- the lender and the project company may agree that the project company may deliver the asset intended to be pledged to a third party;
- for pledging of cargo in the warehouse, the project company only needs to endorse the pledge on the warehouse warrant and pass the endorsed warehouse warrant to the lender;
- any pledge of rights represented by a written instrument will be perfected upon receipt of the instrument by the lender and notification to the maker;
- a pledge of an instrument to order is perfected by endorsement upon the instrument;
- a pledge of an instrument issued to a named person and not transferable by endorsement is perfected by statement of the pledge upon the instrument and notification notified to the maker; and
- a pledge of shares or debentures is perfected by entering the pledge into the books of the issuer.

Upon completion of the pledge process, the creditor will have a preferential lien against the encumbered assets. However, the creditor's lien is subordinated to tax and wage claims.

Perfecting a right (claim) assignment or transfer

The Civil and Commercial Code provides that a transfer of rights and claims concerning specific performance of contract obligations such as the transfer of potential insurance recoveries from the insurer will be effective only when the transfer is recorded in writing and signed by both transferor and transferee and written notification of such transfer has been served to the obligor under the contract involved.

3 Existing liens

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

For liens, such as a mortgage, that require registration to perfect the lien, the registration records of the relevant registration office (eg, the Land Office and the Department of Industrial Works) should be inspected.

For liens for which registration is not required or permitted, borrower disclosure or due diligence is necessary. A review of the borrower's corporate books (share register), financial statements, external auditor's report and notes, and a physical inspection of assets are in order.

In all cases, a review of the project sponsor's financial standing through review of financial statements and annual reports is advisable.

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?

On enforcement of a mortgage, the project lender must first serve a written notice to notify the debtor to perform his or her obligation within a reasonable period. If the debtor fails to comply with his or her obligation, the project lender is entitled to enforce the mortgage in court by requesting the court to seize the mortgaged property and then sell it by public auction. Given that only public auction is allowed, the project lenders themselves are able to participate as buyers in any sale on an arm's length basis. The project lender is not allowed to make a private sale. Such public sale must be made in baht only.

With regard to enforcement of a pledge, the pledgee must first

serve a written notice to notify the debtor to perform his or her obligation within a reasonable period. Failure to comply with his or her obligation enables the project lenders to sell the pledged property by public auction. If said notice to the pledgor is impracticable, the pledgee has the right to sell the pledged property after one month from the time the obligation became due by a public auction. Given only public auction is allowed, the project lenders themselves are able to participate as buyers in any sale on an arm's length basis. The project lender is not allowed to make a private auction. Such public sale must be made in baht only.

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?

Thailand's bankruptcy law and proceedings apply equally to individuals and private entities, including project companies and sponsors, regardless of nationality. However, the bankruptcy law is not applicable to Thai state agencies. The dissolution and liquidation of a state agency requires government or National Assembly legislation.

6 Foreign exchange

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

There is no official charge applicable to foreign currency exchange. However, commercial banks might charge other service fees, such as a transmission fee.

The Exchange Control Act BE 2485 (1942) establishes currency exchange controls and authorises the Bank of Thailand to regulate the currency exchange. The basic control rules are as follows:

- any person wishing to remit foreign currency abroad must apply to the Bank of Thailand for prior approval; and
- any person receiving foreign currency from overseas must report the import to the Bank of Thailand and, except if the account is a foreign currency account, thereafter exchange the foreign currency for baht within the time prescribed by Bank of Thailand.

Recently, the Bank of Thailand relaxed the controls on the remittance of foreign currency abroad and authorised commercial banks to approve applications for foreign currency remittance and collate reports on the import of foreign currency from overseas on its behalf.

Thailand imposes no specific restrictions on project finance deals with offshore financial institutions. There are no taxes or duties on foreign currency exchange transactions.

The project company may establish offshore bank accounts for paying for supplies and services from overseas suppliers.

7 Remittances

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

Remission of funds from Thailand to repay principal and interest requires prior approval from the Bank of Thailand. The commercial bank acting on behalf of the Bank of Thailand will require project company evidence of the payment obligations, such as copies of the credit agreements.

Corporate income tax must be withheld from interest payments and consulting fee payments. Withholding tax rates range from 10 per cent (for residents of countries enjoying treaty protection against double taxation) to 15 per cent (for other cases). Where such an anti-

double taxation treaty is in force, the withholding tax can be credited against taxes payable in the recipient's country of residence.

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?

Thailand does not require project companies to repatriate foreign earnings. On the contrary, Thailand encourages foreign investors and lenders to reinvest their earnings in activities such as business expansion and extensions.

9 Offshore and foreign currency accounts

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

Subject to the regulations imposed by the Bank of Thailand noted above, project companies may maintain foreign currency accounts in both Thailand and other jurisdictions.

The deposit of foreign currency originating from abroad in a Thai bank is unrestricted. Any person, individual or corporation in Thailand can purchase, exchange or borrow foreign currency from an authorised Thai dealer as follows.

In the case of obligations to pay a foreign creditor in foreign currency, proof of the obligations (eg, the credit agreement) is required whereupon foreign currency can be obtained and deposited in an amount not exceeding such obligations. The total outstanding balance of all foreign currency accounts of such depositor shall not exceed US\$1 million for a natural person and the greater of US\$100 million and foreign currency obligations due within 12 months in the case of a juristic person.

In other cases, the total outstanding balance of all foreign currency (obtained in Thailand) of a depositor shall not exceed US\$100,000 for a natural person and US\$300,000 for a juristic person.

A project company must obtain prior approval from the Bank of Thailand before establishing a foreign currency account outside Thailand. The details and necessity of the transaction together with related documents must be submitted. After approval, the Bank of Thailand must receive notification of each transaction.

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 laws and regulations governing participation by foreign investors in business activities in Thailand. The main governing law is the Foreign Business Act BE 2542.

The act limits the rights of foreigners to engage in certain business activities in Thailand. The act defines an 'alien' or a 'foreigner' as a natural person or a juristic entity. Companies are considered 'foreign' if 50 per cent or more of their share capital belongs to foreign individuals or juristic persons.

The act also lists three categories of controlled business activities, as follows:

- activities that fall under List 1 are strictly prohibited to aliens, such as the newspaper business, land trading, rice farming and animal farming;
- businesses that may affect national security or safety, art, culture, customs and native manufacturing are covered by List 2 and are prohibited for operation by aliens unless permission is granted by the Ministry of Commerce; and

- businesses that are covered by List 3 may not be carried out by aliens unless permission is granted by the director-general with the approval of the Foreign Business Board, such as the engineering service business, legal service business and architecture business.

In some instances, foreigners may be exempted from certain requirements imposed by the act. These include the following:

- foreigners operating a business under the protection of a treaty to which Thailand is a signatory, such as the Thailand-US Treaty of Amity;
- foreigners who engage in regulated businesses with the permission of the Thai government for a specific duration; and
- foreigners who engage in businesses with permission granted by the Board of Investment (BOI) and the Industrial Estate Authority of Thailand.

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?

Registering, filing or otherwise complying with legal formalities are not requisites for financing or for project documents to become valid or enforceable.

The financing or project documents may be in any language and parties abroad can sign the documents without the presence of a notary public. It is worth noting however, that to obtain approval for the repatriation of foreign currency, loan repayments and interest on foreign currency overseas, the Bank of Thailand will require the applicant to submit a Thai translation of such documents which are submitted in a language other than Thai or English.

Please also refer to the guidelines on evidence for receiving and remitting foreign currency below.

12 Government approvals

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

Thailand has restructured and liberalised its finance and banking industry and project finance transactions with foreign parties are not restricted. However, as noted above, lenders or borrowers must present the credit agreements to the Bank of Thailand through the relevant commercial bank, in order to remit debt service payments in foreign currency to overseas lenders.

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?

Thailand is liberalising its insurance industry and now allows foreign majority-owned insurers to serve the domestic market. However, insurance for projects in Thailand must be placed with a Thai-licensed insurer. Thai-licensed insurers are permitted to reinsure portions of their underwriting exposure with overseas reinsurers.

As Thai law permits the assignment of insurance proceeds, a project company may assign its right to receive compensation from an insurer to its lenders, foreign or domestic.

14 Foreign employee restrictions

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

The Immigration Act BE 2522 (1979) and the Working of Aliens Act BE 2551 (2008) restrict the hiring of foreigners. A foreigner cannot perform any service unless he or she has obtained a work permit

from the Ministry of Labour. In addition, certain occupations are reserved exclusively for Thai nationals.

The granting of a work permit is discretionary. In general, a Thai corporate employer must have a registered paid-up capital of not less than 2 million baht for each foreign worker it has hired. However, if the corporate employer is foreign (under the Foreign Business Act), it must have a foreign investment of not less than 3 million baht for each foreign worker. However, where government contracts, upstream oil and gas companies, or BOI-promoted companies are involved, work permits are readily granted. In addition to the work permit, any foreigner entering Thailand for employment purposes must obtain a Non-Immigrant Visa type 'B'. Any spouse and dependants wishing to enter Thailand must obtain a Non-Immigrant Visa type 'O'. Multiple-entry options are available for an extra fee. These visas are subject to annual renewal.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

Thailand restricts the importation of any equipment that is available domestically from manufacturers promoted by the Thai Board of Investment, such as electrical cables and cars. The restrictions also apply to equipment that could be hazardous to public and personal health or national security, including radioactive sources, concentrated oxidation agents and explosive materials. Such restrictions range from a total ban on imports to the imposition of rules for the importer to comply with, such as requiring the importer to first secure an import permit and setting import quantity limitations.

The importation of project equipment is subject to a wide range of laws and regulations. The main governing laws and regulations are the Customs Act, BE 2543 (AD 2000).

16 Nationalisation and expropriation

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

Thailand is a signatory to many trade or investment multinational, regional and bilateral agreements that limit nationalisation and expropriation except on a non-discriminatory basis for public interest purposes. In such cases, fair compensation based on the assessment of the market value of the investment must be paid to the affected investors. While treaty protection from expropriation applies only to the signatory country investors, all foreign investors enjoy protections under the Constitution BE 2550 (2007) and the Expropriation of Immoveable Property Act BE 2530 (1987), which provide that the state can exercise its right to expropriate immoveable property only for the purposes of public utilities, necessary national defence, exploitation of national resources, town and country planning, promotion and preservation of the quality of the environment, agricultural or industrial development, land reform, conservation of ancient monuments and historic sites or other public interests, and fair compensation must be paid. In addition, BOI-promoted companies are provided with explicit guarantees against nationalisation.

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 and Thai investors or lenders are eligible for the same tax incentive schemes. Thailand's current tax incentives range from tax holidays of three to eight years, reduced or zero-rated import duty on capital goods, value-added tax refunds for materials imported for export manufacturing, to zero-rated value-added tax on exports.

Other incentives include the right to repatriate equity and profits

in foreign currency, entitlement to hold title to freehold land for the project and eligibility to hire foreign experts and executives to work in Thailand.

Interest on all loans – domestic or foreign – is subject to withholding tax at the rate prescribed in the Revenue Code. Thailand is party to treaties for the avoidance of double taxation (usually, based on the OECD model agreement) with a number of countries, including Japan, India, the United Kingdom, Belgium and the Netherlands. The treaties effectively reduce the withholding tax rate from 30 per cent to between 10 per cent and 15 per cent. The Thai withholding tax may be credited against the corporate income tax due in the treaty country.

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?

Government regulation of project companies in Thailand varies by sector. For oil and gas projects, a concession to explore, produce, store, transmit and sell must be granted by the Department of Fuel, Ministry of Energy. Mineral extraction and chemical refining projects are subject to Ministry of Industry regulation. Water treatment projects are supervised and controlled by the Department of Water Resources, Ministry of Environment. Electric power generation and transmission projects are subject to regulation by the Electricity Generating Authority of Thailand, a state enterprise under the Ministry of Energy. All public transport and ports are subject to regulation by the Ministry of Transportation.

State-owned or controlled enterprises include the oil, gas and petrochemical projects operated by the PTT Public Company Limited; the Port Authority of Thailand, a state enterprise responsible for managing and developing ports in Thailand; the Electricity Generating Authority of Thailand; the Metropolitan Electricity Authority; and the Provincial Electricity Authority, which together monopolise the retail, distribution and sale of electricity in Thailand.

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?

Thailand's Arbitration Act BE 2545 (2002) adopts the core of the UNCITRAL Model Law. The act allows the parties the choice of arbitration rules and venue. Any arbitration and award enforcement in Thailand must proceed in compliance with this act.

Thailand is a party to the New York Convention on Arbitration since 1959. Arbitration awards that have been awarded in the Convention's member states can be enforced in Thailand.

Thailand also recognises ICSID. Arbitration and awards using the ICSID process are enforceable in Thailand through the process outlined in the Arbitration Act 2002.

Dispute resolution through arbitration is limited to civil issues such as business, trade and commercial disputes. State enterprises may agree to have disputes with private sector counterparties resolved through arbitration. In some instances, disputes with state agencies may be resolved through arbitration, such as oil and gas royalty disputes.

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?

With certain exceptions, the contracting parties may freely choose the governing law and the choice of foreign law will be enforceable.

In project finance in Thailand, the laws of England are generally specified. However, the choice of foreign governing law is subject to the constraint that the foreign law must not be contradictory to the national law or contrary to the good morals or public order of the people of Thailand. The general rule on severity of contract applies to contract provisions that contradict the law. For example, if a contract provision requires a borrower to repay its loan in foreign currency without first obtaining an approval for remitting foreign currency from the Bank of Thailand in violation of the Exchange Control Act, that clause will be void and unenforceable.

21 Jurisdiction and waiver of immunity

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

Thai law is silent on the legal effect of submission to the jurisdiction of foreign courts. A foreign court judgment is not enforceable in Thailand, but a final judgment it is admissible as evidence in a legal proceeding in Thailand. A waiver of sovereign immunity will be effective provided that such waiver has been explicitly stated in writing.

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?

Under Thai legal principles all natural resources belong to the state. Any person wishing to explore or produce natural resources must obtain a concession or licence. The granted concession may not infringe upon fundamental rights, such as landownership of third parties. Under these principles, a landowner has no inherent mineral or other natural resources rights, and rights may be granted by the state to third parties under a concession or licence. However, the concessionaire would have to seek the permission of the landowner to carry out the mineral exploitation activities and compensate for losses, such as loss of use of the land and crop damage.

The government, in the public interest, may expropriate private property for use in natural resource exploration and production, for example, for laying oil and gas pipelines. Mitigation measures concerning the affected population must be implemented by the government. Such mitigation measures may include relocation, occupational training and monetary compensation.

Thailand does not recognise any special rights of aboriginal, indigenous or tribal peoples. All Thai citizens, including tribal peoples, have equal rights.

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?

Concessions granted for natural resource exploration and production generally require payment of both royalties and specified taxes. Under standard petroleum and mineral mining concessions the concessionaire is subject to monthly royalties on gross revenue and an annual income tax. There is no distinction between royalties and taxes payable by domestic or foreign concessionaires.

24 Export of natural resources

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

Thai law permits the imposition of restrictions on natural resource exports in cases of compelling national security reasons. For example, the energy minister is authorised to prohibit the export of indigenous petroleum as may be necessary to ensure adequate supply for domestic consumption. Thailand will also embargo natural resource

exports to restricted countries as mandated by UN sanctions. Export duties are imposed per tariff schedules.

25 Environmental, health and safety laws

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

General and specific laws govern each sector. Various government departments, committees or state enterprises oversee the granting of concessions or licences to project companies, prescribing of rules, issuance of regulations and collection of royalties. The key environmental, health and safety laws are the following.

The Environmental Conservation and Protection Act establish the National Environment Board with the prime minister as chairperson and the Office of Natural Resources and Environmental Policy and Planning as the board secretariat office to ensure the protection, conservation and promotion of the national environment. If the sector requires prior approval of an environmental impact assessment (EIA) report and the impact of proposed mitigation measures, the project company must conduct a study and assessment and submit an EIA report for approval before embarking on the project work. In addition to the EIA requirements, any project or activity which may seriously affect the community with respect to the quality of the environment, natural resources and health must have a Health Impact Assessment completed and approved before commencing the project work.

The Labour Act deals with health and safety for workers by issuing ministerial regulations and directives on safety and health measures and standards for working labour. The Labour Department is the secretariat office for the Labour Committee.

The Building Control Act deals with construction safety and public safety by issuing ministerial regulations and directives thereon. The Department of Public Works and Town and City Planning is the secretariat office for the Building Control Committee.

The Public Health Act deals with public sanitation by empowering the health minister to issue ministerial regulations and directives thereon. The Department of Public Health is the secretariat office for the Public Health Committee.

For sectors with greater impact on the environment, health and safety, the minister in charge may impose additional measures to ensure proper protection of the environment, health and safety for both the workers and the public, namely:

- the Petroleum Act, which governs the upstream oil and gas sector and the implementation of regulations on operational environment, health and safety for the petroleum concessionaires and contractors;
- the Factory Act, which governs downstream manufacturing activities, including oil refining, gas separation and petrochemical manufacturing;
- National Executive Decree No. 28 of 1972, which authorises regulation of gas storage construction, gas filling plant operations and gas dispensing facilities; and
- the Oil Fuels Storage Act, which authorises regulation of the construction and operation of large oil storage facilities.

26 Project companies

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

Project companies in Thailand generally take the form of a private limited liability company. The shareholding structures are dictated largely by the nature of the business that they plan to pursue subject to the constraints of the Alien Business Act 1999. Concessions for projects of major national economic significance typically include state participation in the equity. On the other hand, 'high risk, high return' types of venture such as, upstream petroleum concessionaires,

Update and trends

Thailand has been embracing the control of the business operations of financial institutions through emphasis on international standards. As a result, the commercial banks as well as the state banks saw themselves having had to maintain their capital reserves against NPL below 10 per cent compared to the acceptable standard level of 12.5 per cent. All these actions provided strength for Thai financial institutions as well as the Thai economy as a whole to be able to weather the effects of the financial crisis.

As from Q1 of 2010, Thailand saw the baht currency consistently remain strong against the world's major currencies.

In addition, major industries such as automobile and electronics manufacturing embarked on continuing worker re-employment sprees to ensure their capacity to fill the rocketing domestic and export orders as from Q1 of 2010, while exports have continued to grow markedly year-on-year.

Meanwhile, the government has been successful in securing funds from the World Bank, ADB, and JICA to finance its infrastructure projects, such as highway expansion and mass transit construction projects that are due to begin in Q4 of 2010. In the private sector,

construction contractors have been successful in combining with foreign partners and in securing finance and support offers for the execution of government infrastructure construction projects.

Thailand foresaw that its future security rests heavily on the supply of energy, especially electricity and fossil fuels. According to its 15-year power producing plan, Thailand is encouraging the private sector to invest in producing electricity from renewable sources such as solar- and wind-powered plants through providing a 'price multiplier' that would be payable in addition to the base power purchase price to VSPPs (very small power producers) and SPPs (small power producers) for the first 10 years after the commercial operation dates of their plants. The scheme has overwhelmingly attracted investment in solar power plants. The Provincial Electricity Authority (PEA) agreed to purchase a total of around 1,100MW from about 300 VSPPs, while the Electricity Generating Authority of Thailand (EGAT) agreed to purchase another 2,000MW from a number of SPPs. The total amount of power purchased by these two authorities exceeds the original planned amount sixfold, and there will be a total capital investment of around US\$5,000 million in the next three years.

are often wholly foreign-owned in the exploration phase with state equity participation following commercial production.

Major projects are generally funded with sponsor equity and domestic and foreign loans. Projects under government sponsorship are often financed in part through funding from international financial institutions such as the World Bank, ADB and JBIC. Thai banks frequently participate in syndicate lending with foreign project lenders acting both as the security agent for the syndicate and as providers of local currency (baht) loans to the borrower.

The issuance of publicly traded securities for the financing of new ventures is not possible as listing rules prohibit it. Similarly, new project companies would also be restricted from taking advantage of securitisation and borrowing from the domestic money market. It is possible for a project company to raise capital in an initial public offering after a sufficient project operating and earnings history has been established in accordance with listing rules.

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?

Thailand enacted its public-private partnership legislation in 1992 (the Act of Private Participation in State Undertakings, BE 2535 (1992)). The act is not industry-specific but applies to any public-private partnership for any project venture that has an investment level at or above a threshold prescribed by the act.

28 PPP – limitations

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

Any PPP venture with an investment level of 1 billion baht or more is subject to the requisites and procedures prescribed in the Act of Private Participation in State Undertakings, BE 2535 (1992). Nevertheless, the act also allows flexibility for the Council of Ministers to decide that a PPP with an investment value of less than 1 billion baht be subject to the stipulations of the act.

29 PPP – transactions

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

The Electricity Generating Authority of Thailand (EGAT) is the state enterprise in charge of electricity generation carried out by independent power producers (IPP), by small power producers (SPP) and by very small power producers (VSPP) programmes (now the Provincial Electricity Authority (PEA) is responsible for granting concession and purchasing power to VSPP); the IPP project has been very well executed and is considered as one of the most successful PPP projects in Thailand. The key to success was mainly the efficient allocation of risk between EGAT and the IPPs, as well as the payment structure, which collectively provided the right incentives for IPPs to meet their obligations and a deliver high-quality service to the public. The size of the project is 5,943MW in total.



Paniti Junhasavasdikul
David Doran
Bundit Attakor

jpaniti@dfdlmekong.com
david.doran@dfdlmekong.com
bundit@dfdlmekong.com

Dusit Thani Building, 9th Floor
 946 Rama IV Road, Silom
 Bangkok 10500
 Thailand

Tel: +66 2636 3282
 Fax: +66 2636 3290
 www.dfdlmekong.com
 thailand@dfdlmekong.com



GETTING THE DEAL THROUGH[®]



Annual volumes published on:

Air Transport	Merger Control
Anti-Corruption Regulation	Mergers & Acquisitions
Arbitration	Mining
Banking Regulation	Oil Regulation
Cartel Regulation	Patents
Climate Regulation	Pharmaceutical Antitrust
Construction	Private Antitrust Litigation
Copyright	Private Equity
Corporate Governance	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Environment	Restructuring & Insolvency
Franchise	Right of Publicity
Gas Regulation	Securities Finance
Insurance & Reinsurance	Shipping
Intellectual Property & Antitrust	Tax on Inbound Investment
Labour & Employment	Telecoms and Media
Licensing	Trademarks
Life Sciences	Vertical Agreements

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006



The Official Research Partner of
the International Bar Association