



Project Finance

in 45 jurisdictions worldwide

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Cambodia

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1 Collateral

What types of collateral are available?

Collateral over which security can be created under Cambodian law includes moveable property (serial-numbered vehicles, instruments, documents, secured sales contracts, etc), goods (equipment, inventory, consumer goods, consigned goods, leased goods, etc), intangible property and the proceeds of the aforementioned. In addition, security can be created over immovable property (land, building, rights *in rem*, fixtures) under the Land Law of Cambodia.

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?

In general, a security interest is perfected when it has been attached to the collateral and a notice of the same has been filed. In addition, security agreements with respect to immovable property must follow the model security agreement and must be entered into in the presence of the competent authority.

The filing of notice is not required to perfect some security interests such as a purchase money security interest in consumer goods, a security interest in proceeds and a security interest in a guarantee. A security interest in goods, instruments, documents or secured sales contracts may be perfected by filing or by the secured party's taking possession of the relevant collateral. The perfection of a security interest in money can only be effected by the secured party taking possession of the money. Nominal fees are payable to file a notice to perfect a security interest.

As a general rule, the time of filing or perfection determines the priority of security interests in the same collateral. There are some exceptions to this general rule. A perfected purchase money security interest in equipment, for instance, has priority over conflicting security interests in the same equipment, even those created and perfected before the perfection of the purchase money security interest, if the purchase money security interest is perfected when the debtor receives possession of the equipment or within five days thereafter.

If there is neither filing nor perfection among various security interests in the same collateral, the first security interest to attach has priority over the other security interests.

Collateral may be held by a corporate entity in the capacity of agent or trustee of – and for and on behalf of – a secured party. As such, that collateral would not be considered to form part of the estate of that agent or trustee in the event of their bankruptcy. The parallel debt clause concept is not expressly recognised under Cambodian law and, consequently, such clause is not commonly used in practice.

3 Existing liens

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

Creditors may perform a search at the Secured Transactions Filing Office at the Ministry of Commerce and, for immovable property, a search in the Land Registry Office of the Ministry of Land Management, Urban Planning and Construction for an existing security interest that has been filed. For security interests that are perfected without filing, there is no established mechanism to assure the absence of such security interests in the collateral other than representations and warranties obtained from the debtor.

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?

For secured interests over immovable property, the secured party cannot take ownership of the secured immovable property upon default of the debtor (unless there is no objection from the debtor and its creditors, if any). The secured party can only claim for a compulsory sale of the secured immovable property in court. The sale of the immovable property must be made by public tender or auction. The court may prescribe another method of sale if the sale cannot be made through public tender or auction. The creditor can participate in the sale of the property. There is no requirement that the sale must be completed in local currency.

For security interests over moveable property, goods and intangible property which are created and perfected in accordance with the Law on Secured Transactions, the secured party shall, upon default, have the right of possession or control over the collateral even if the security agreement is silent about possession or control. The secured party may proceed directly against the debtor upon default with respect to its accounts or other intangible properties and is entitled to notify an obligor on an account or the obligor on any other intangible property to make payment to the secured party, and also to take control of any proceeds.

For other collateral, the secured party shall be entitled to a special, expedited order from the court granting the secured party possession or control over the collateral upon default. Issues at the hearing are limited to the existence of a security agreement covering the collateral and at least one event of default. It should be noted that the secured party may take possession or control of collateral without legal proceedings if the debtor has agreed in writing after default. A secured party may sell, lease, license or otherwise dispose of any or all of the collateral. Disposal of the collateral may be made publicly or privately, in one or more contracts, and the secured party shall give reasonable notice to the debtor. The secured party may buy that collateral at any public or private sale. The secured party is required to inform any other secured party from whom the secured party has received a written record of an interest in the collateral.

The secured party shall act at all times in a commercially reasonable manner when disposing of the collateral.

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?

No action, proceeding or execution process may be commenced or continued against a debtor or the estate of a debtor after the commencement of an insolvency proceeding in respect of that debtor. The administrator may, however, give written authorisation to secured creditors to repossess and sell the encumbered assets in accordance with applicable law or in any other way avail themselves of their security right. Employee wages, remuneration for the provisional administrator, administrative fees and court fees have priority over the security in the proceeds of the liquidation.

The bankruptcy proceedings provided under the Law on Insolvency do not apply to banks and financial institutions, insurance companies, and those governed by the Law on Issuance and Trading of Non-Government Securities which, in each case, would be subject to laws more specific to them (banking and financial institutions regulations, insurance regulations and regulations related to the issuance and trading of non-government securities).

Immovable property collateral can only be foreclosed through court proceedings. For accounts or other intangible property collateral, the secured party may collect the collateral without judicial action. The secured party may also take possession or control of other collateral upon default outside of court proceedings if the debtor has agreed in writing after default. It should be noted that the secured party is entitled to a special, expedited order from the court granting the secured party possession or control over the collateral. The hearing is limited to only two issues: the existence of a security agreement and the existence of an event of default.

6 Foreign exchange

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

No restrictions are imposed on foreign exchange operations, including purchases and sales of foreign exchange, transfers, all kinds of international settlements and capital flows in foreign or domestic currency, between Cambodia and other countries. There are no taxes payable to any governmental authority on foreign currency exchange. Nevertheless, the National Bank of Cambodia may impose certain temporary restrictions – for up to three months, extendable upon approval by the prime minister – on foreign exchange operations in the event of a foreign exchange crisis.

7 Remittances

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

In general, there are no restrictions or controls on remittances of investment returns or loan payments to other jurisdictions.

Nevertheless, the remittance of investment returns or loan payments and other transfers overseas relating to the investment must be undertaken through banks established in Cambodia. Prior declaration to the National Bank of Cambodia is required for offshore investment made by residents for amounts equalling or exceeding US\$100,000. The payment of interest or dividends to non-residents is subject to 14 per cent withholding tax.

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?

Cambodian 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?

Cambodian project companies may establish and maintain foreign currency accounts in both local and offshore banks. No specific approval is required.

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?

In general, foreign investors enjoy the same treatment as local investors. However, there are some restrictions imposed on foreign ownership in some sectors such as landownership, printing and printing related services, radio and television activities. In the aforementioned sectors, the ownership of foreign investors is limited to 49 per cent. In some other sectors such as exploitation of gemstones, making bricks from clay and tile, rice milling, silk weaving and manufacturing of wood, and stone carving, local equity participation is required. Except for the 14 per cent withholding tax that applies to the payment of dividends to non-residents, there are no specific fees or taxes applicable to foreign investors over and above the general fees and taxes applicable to the project and the related companies. No additional registrations and approvals are specifically required for foreign investment besides the registrations and approvals that are required generally for the project and the related companies.

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?

For moveable property, only a notice of the security agreement related to the security interests needs to be filed with the relevant government authority for perfection. However, it is advisable to also file the security agreement with the government authority. For the registration of a security interest in immovable property, the execution of an additional mortgage agreement in the Khmer language in the form provided by the cadastral office is required.

12 Government approvals

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

The government approvals required for typical project finance transactions are substantially the same as those required for an infrastructure project. For example, government approvals required for the financing of a large-scale power project would include the general downstream approvals (including commercial registration with the Ministry of Commerce, tax registration with the General Tax Department, labour registration with the Ministry of Labour and Vocational Training, and, if the project qualifies for investment incentives, registration with the Council for the Development of

Cambodia) and upstream approvals, which notably include:

- approval by the Council of Ministers of the project;
- authorisation of the Ministry of Industry, Mines and Energy;
- an electricity licence from the Electricity Authority of Cambodia;
- approval and various permits from the Ministry of Environment;
- a construction permit from the Ministry of Land Management, Urban Planning and Construction; and
- a water use authorisation from the Ministry of Water Resources and Meteorology.

The profits of the project company shall be subject to a 20 per cent profit tax; however, the project company can enjoy a profit tax exemption for up to nine years if its project meets 'qualified investment' project criteria and other specified criteria. The payment of dividends, interest, rental and service and technical payments to non-residents by the project company is subject to a 14 per cent withholding tax.

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?

All insurance policies over project assets must be obtained through an insurance company registered and licensed to operate in Cambodia. Insurance contracts worth over US\$500,000 are allowed to be reinsured with offshore insurance companies. Insurance policies may be payable to foreign secured creditors.

14 Foreign employee restrictions

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

There is a restriction on the employment of foreign staff under Cambodian law. Companies are only authorised to bring foreign staff whose qualifications, skills and expertise are not available among Cambodian citizens to work in Cambodia. The permitted number of foreign staff is limited to 10 per cent of the total workforce. To employ foreign staff exceeding this ratio, approval must be sought from the minister of labour and vocational training, who generally approves such request by foreign investors.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

Other than the payment of import duties and customs clearance, the import of project equipment and materials can be undertaken without any governmental approval except for the importation of some hazardous and sensitive materials, which may require the approval of the relevant government authority. Investment projects which are entitled to the import exemption of production equipment, construction materials and production inputs, are required to obtain prior approval of the CDC on the equipment and materials to be imported under the import tax exemption.

16 Nationalisation and expropriation

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

Protection against nationalisation and expropriation is provided in both the Law on Investment and various bilateral and international agreements to which Cambodia is a party. No form of incorporation is especially protected. Nonetheless, it is advisable to register

the project as a qualified investment project (if the project qualifies for such registration) to ensure that the project enjoys the protection provided under the Law on Investment.

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?

Profit tax exemption for up to nine years or special depreciation (as selected by the investors) and import tax exemption on the import of production equipment, construction materials and production inputs (the latter is only granted to export and supporting industry projects) are available for qualified investment projects. Large-scale infrastructure projects will usually qualify for these investment incentives.

Other than certain tax exemptions granted to some multilateral and bilateral financial institutions, foreign creditors may not enjoy any significant incentives.

Besides the 14 per cent withholding tax applicable to certain payments made to non-residents, only nominal fees are payable to the government authority to register the security documents.

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?

See questions 12 and 25 on the relevant government agencies and their respective authority.

Some infrastructure projects, such as airports, roads and railways, were originally owned and operated by the state or state-owned enterprises, before they were granted as concessions to private investors. Some other projects, in particular hydroelectric power plants and power transmission lines, are new projects that have never been established or operated by the state; however, the ownership of these projects will often be transferred to the state or state-owned enterprises after the end of the concession period.

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?

International arbitration and the enforcement of foreign arbitral awards are specifically recognised under the Law on Commercial Arbitration and the Law on the Approval and Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Cambodian courts may enforce foreign arbitral awards without examining the merits of the matter except where:

- the arbitration agreement is not valid under the law governing that agreement;
- notice of arbitration was not properly given;
- the award is given in relation to disputes or matters falling outside the scope of the arbitration agreement;
- the composition of the arbitration tribunal is not in accordance with the arbitration agreement or alternatively, the laws of the country where the arbitration was held;
- the award is not final and binding under the laws of the country in which the award was given;
- the subject matter is not capable of being settled by arbitration under Cambodian law; or
- the recognition or enforcement of the award would be contrary to public policy.

While Cambodian courts are entitled to reject the enforcement of an arbitral award if the courts find that the object of the dispute is not arbitrable under Cambodian law, there is no clear regulatory guidance as to the types of disputes that are not arbitrable. Similarly, we are not aware of any Cambodian law or regulation that subjects any types of disputes to automatic domestic arbitration.

To our knowledge, no foreign arbitral award of a commercial dispute has been enforced, in recent times, in Cambodia.

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?

Except for the concession agreement, which is required to be governed by Cambodian law, other project agreements and financing agreements are typically governed by foreign laws such as English law, New York law, Chinese law and Singaporean law. Security agreements are typically governed by Cambodian law, except those related to collateral located outside Cambodia.

21 Jurisdiction and waiver of immunity

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

The submission to a foreign jurisdiction is effective and enforceable under Cambodian law. Except in the following circumstances, Cambodian courts may enforce foreign court judgments without examining the merits of the matter:

- the foreign court did not have jurisdiction to hear the matter;
- the foreign court judgment was issued by default;
- the foreign court judgment violates the public policy or morals of Cambodia;
- there is no guarantee of reciprocity between Cambodia and country in which the foreign court is based; or
- the foreign court judgment is not final and conclusive.

To our knowledge, Cambodia has not signed any treaty of guarantee of reciprocity on foreign judgments with any other country.

There is no restriction on waiver of immunity. To date, the Cambodian government has granted such waiver of immunity in several instances.

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?

All natural resources including oil, gas, mineral resources, water resources, etc are the property of the state. Private parties may acquire production sharing rights in oil and gas, concession rights over other mineral resources, or water use right through a water licence or permit. In general, the aforementioned rights can be obtained by both local and foreign parties. Holders of oil and gas production-sharing rights and mineral concession rights are required to pay royalties and surface rent, and have other obligations as specified in the relevant regulations, the petroleum or concession agreements, and the licences and permits issued by the relevant ministries.

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?

Royalties applicable to petroleum shall be at least 12.5 per cent of the value of the petroleum sold. As to other mineral resources, the royalties for some types of mineral resources are set at a specific amount per unit of mines and the royalties for some mineral resources are set

at a percentage of the value of the mineral products sold. A 30 per cent tax applies to the profits realised from oil and gas production-sharing businesses and other natural resource businesses.

24 Export of natural resources

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

Export of all natural resources is prohibited. Natural resources are reserved for local supply and processed for export. Only processed products of natural resources can be exported.

25 Environmental, health and safety laws

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

The following are some key laws and regulations to which project companies are commonly subject:

- business enterprise law, commercial registration law and regulations, and secured transaction law (Ministry of Commerce);
- investment law and regulations (Council for the Development of Cambodia);
- concession law (Council for the Development of Cambodia and the ministry in charge of the infrastructure project);
- land law and regulations, and construction regulations (Ministry of Land Management, Urban Planning and Construction);
- factory law, and law and regulations on the management and exploitation of mineral resources (Ministry of Industry, Mines and Energy);
- environmental law and regulations (Ministry of Environment);
- taxation law and regulations (Ministry of Economy and Finance);
- labour law and regulations (Ministry of Labour and Vocational Training);
- electricity law and regulations (Electricity Authority of Cambodia);
- petroleum regulations (Cambodian National Petroleum Authority); and
- water resource management law (Ministry of Water Resource and Meteorology).

26 Project companies

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

Virtually all project companies take the form of a private limited liability company (two to 30 shareholders) or a single-member private limited liability company. Besides equity finance, project companies can obtain finance from both offshore and local banks and from private financial institutions, bilateral financial institutions, notably, Proparco (the Investment and Promotions Company for Economic Cooperation) and Deutsche Investitions- und Entwicklungsgesellschaft mbH (DEG) and multilateral financial institutions, notably the International Finance Corporation and the Asian Development Bank.

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?

The Law on Concessions was enacted on 19 October 2007 to promote and facilitate privately financed infrastructure projects throughout the country. The Law on Concessions only provides for the main legal framework related to the infrastructure project investment. Comprehensive regulations (ie, an implementing subdecree) are expected to be enacted in the near future. In addition, a number

Update and trends

The global financial crisis appears to have had little effect on private infrastructure investment in Cambodia. We note that most of the private infrastructure investment projects, the majority of which are power projects developed by Chinese investors and financed by Chinese banks, have proceeded on schedule or without significant delay. There seem to be no particular programmes or incentives enacted by the government during the financial crisis to increase private investment in infrastructure.

While power sector remains and will, in our view, continue to be the leading sector for project finance in Cambodia for the years to come, telecommunications and information technology infrastructure, tourism facilities and transport facilities have recently emerged as new sectors for project finance, and they are expected to gain further momentum following the financial crisis.

of industry-specific laws have been enacted or are expected to be enacted soon, including the Law on Electricity, the draft Law on Telecommunications, etc.

entitled to grant a longer concession period if the nature of the infrastructure project requires a longer term. As to the governing law, the concession contract must be governed by Cambodian law.

28 PPP – limitations

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

The legal restrictions on PPP transactions that should be highlighted are the term of the concession and the governing law of the concession contract. The term of the concession is limited to 30 years from the signing of the concession contract. However, the government is

29 PPP – transactions

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

The most significant PPP transactions completed to date include the SCA airport concession, the CPTL power transmission line project, the 194.1MW Sinohydro Kamchay hydroelectric project, and the 338MW Lower Stung Russey Chrum hydroelectric project.



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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).

Myanmar

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1 Collateral

What types of collateral are available?

In general, the types of collateral available for secured transactions are real estate, buildings, leasehold interests, concessions, as well as moveable property including receivables, shares, securities, bank accounts and proceeds from investments. However, under the Transfer of Immoveable Property Restriction Law of 1987, mortgages of immoveable property are not available in connection with secured transactions if the lender is a foreigner, foreign company or foreign bank.

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?

The Myanmar Companies Act of 1913 (MC Act) includes, inter alia, provisions related to certain mortgages and charges to be void if not registered with the registrar of the Companies Registration Office (CRO), and accordingly, such mortgages and charges created on immoveable or moveable property of a company will be void against the liquidator and other creditors of the company unless the prescribed particulars of the mortgage or charge are registered with the CRO. In addition, mortgages on immoveable property also need to be registered under the Registration Act of 1908, which gives a list of documents which must be registered with the Office of the Registration of Deeds. Security interests in moveable property such as bank accounts and shares are made and created by way of a pledge or charge and are perfected by furnishing the secured party with control over such collateral. Creation of a security interest in favour of foreign lender requires approval from relevant government ministries and the Central Bank. The MC Act, the Myanmar Insolvency Act of 1920, the Yangon Insolvency Act of 1909, the Central Bank of Myanmar Law of 1990, the Rules Relating to Financial Institutions of Myanmar Law of 1990 and the Code of Civil Procedure of 1908 are the relevant laws that contain a number of sections dealing with priority of debts that need to be taken into account in connection with protection of secured assets from the general creditors of the borrower. Under the above-mentioned laws, certain payments have preference over payments to be made to creditors. For example, the government, local authorities, the Central Bank and state-owned financial institutions are given priority.

Security gives rise to stamp duty and registration. For example, the proper stamp duty for a mortgage deed is 5 per cent of the amount secured by mortgage deed, when possession of the property or any part of the property covered by such deed is given by the mortgagor or agreed to be given. There will be an additional 2 per cent stamp duty in the case of immoveable property in the Yangon City development area; and 2 per cent of the amount secured by

mortgage deed when possession is not given or agreed to be given. Registration fees for mortgage deeds are calculated according to the value of the right, title or interest affected. When the value exceeds 700 kyats but does not exceed 1,000 kyats the fee is charged at 10 kyats; for each additional 1,000 kyats or part thereof up to a total value of 50,000 kyats the fee is charged at 4 kyats; and when the value exceeds 50,000 kyats for each additional 1,000 kyats or part thereof, the fee is charged at 2 kyats.

There are various fees for stamp duty and registration depending on the type of security interest. Regarding fees for filing any document at the CRO the fee is 75 kyats.

There are no Myanmar reported cases or rulings that could be used as guidance dealing with the specific issue as to whether a corporate entity, in the capacity of an agent or trustee, may hold collateral on behalf of the project lenders as the secured party. In practice, one precedent has shown that a foreign corporate entity had been appointed as security agent on behalf of a foreign lender.

Under the Transfer of Property Act of 1882 (TP Act), in the absence of a contract to the contrary, the mortgagee has a right to obtain from the court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold. However, the TP Act mandates that this provision shall not be deemed to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to initiate a suit for foreclosure. Therefore, a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property is not authorised by the TP Act to initiate a suit for foreclosure.

Under the law of insolvency, the property of the insolvent divisible amongst his creditors will not comprise property held by the insolvent on trust for any other person, and thus, the collateral would be excluded from its estate held by the insolvent on trust.

3 Existing liens

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

Assuming existing mortgages or charges have been duly registered with the relevant government departments such as the CRO, Office of the Registration of Deeds, in theory, searches may be performed by a creditor at the relevant government departments. If a lien is in a particular type of immoveable property or moveable property, collateral is perfected only by control and not by way of a public filing, and the only possible way for a creditor to determine the absence of liens is via obtaining representations and warranties by the debtor or other relevant party to the agreement establishing such control.

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?

Depending on the different types of mortgages embodied in the TP Act, specific requirements under each relevant mortgage vary in connection with initiating a suit for foreclosure or a suit for sale or sale without the intervention of the court. There are also a number of rulings dealing with various issues based on different types of mortgages. In general, a lender would need a court order for enforcement of its security, and cannot enforce its security freely. There is, however, a provision in the TP Act under which a mortgagee may exercise its right of sale without the intervention of the court.

In brief, the TP Act mandates that:

- a mortgagee shall have the power to sell the mortgaged property in default of payment of the mortgage money without the intervention of a court in the following cases:
 - where the mortgage is an English mortgage (an English mortgage is defined under the TP Act as “where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed”), and neither the mortgagor nor the mortgagee is a Hindu, Muslim or Buddhist or a member of any other race, sect, tribe or class from time-to-time specified in the *Gazette*;
 - where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage deed and the mortgagee is the government; and
 - where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property was, on the date of the execution of the mortgage deed, situated within the towns of Yangon, Mawlamyaing, Patheingyi, Sittwe or in any other town or area which the government may, by notification in the *Gazette*, specify in this behalf; and
- no such power shall be exercised unless and until written notice requiring payment of the principal money has been served on the mortgagor, and default has been made in payment of the principal money or part thereof, for three months after such service, or some interest under the mortgage amounting at least to 500 kyats is in arrears and unpaid for three months after becoming due.

It should however be noted that, as mentioned in question 1, mortgages of immovable property are not available for a foreign project lender.

In addition to the above, the Myanmar Contract Act of 1872 (Contract Act) also recognises pledges of moveable property in which it is stated that if the pledgor is in default in payment of the debt or performance at the stipulated time of the promise in respect of which the goods were pledged, the pledgee may bring a suit against the pledgor upon the debt or promise, and retain the goods pledged as collateral security, or may sell the thing pledged on giving the pledgor reasonable notice of the sale. Therefore, in this situation, the pledgee may either sue for the debt retaining the pledge as collateral security or may sell the goods pledged having given reasonable notice.

Apart from the foregoing provisions of the TP Act and the Contract Act, a lender would need a court order and decree to enforce its security in connection with the sale of the mortgaged property. The rules and procedures to be strictly complied with by the parties in connection with institution of a suit are comprehensively provided in the Code of Civil Procedure of 1908 (CPC), which comprises a number of sections and orders and rules such as presenting a plaint, serving a summons, presenting a written statement, framing issues by the court, giving arguments, passing a judgment and decree, etc. There are also specific orders and rules in the CPC dealing with suits relating to mortgages of immovable property such as parties to suits,

and suits for foreclosure, sale, redemption, subrogation, interest and adjustment of account.

According to one Myanmar ruling, generally, the TP Act does not authorise the mortgagee exercising power of sale to purchase the property for himself at an auction sale, and therefore, the mortgagees (project lenders) may not participate as buyers in the sale. Moreover, according to one Myanmar ruling, if the purchaser at the auction is a foreigner, by virtue of the Transfer of Immoveable Property Restriction Law, he will not be entitled to a legal capacity to bid at the sale of immovable property. With regard to judicial sale, no rules are fixed relating to judgment currency. It is at the sole discretion of a Myanmar court to decide whether the judgment would order the payment in equivalent local currency or in a foreign currency. It is assumed, however, that the equivalent of such foreign currency would be decreed by the Myanmar court.

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?

Under the MC Act, any transfer, delivery of goods, payment, execution or other act relating to property which would be deemed a fraudulent preference is invalid. Also, any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Regarding preferential creditors' rights, as mentioned in question 2, under Myanmar law, certain payments have preference over payments to be made to the creditors, for example taxes, cesses, rates due to the government or to any local authorities, debts owed to the Central Bank and state-owned financial institutions, wages and salaries due to clerks and servants for services rendered to the company and wages of labourers or workmen.

According to the law of insolvency, corporations, associations or companies registered under Myanmar laws are exempted from insolvency proceedings.

The MC Act provides, inter alia, for the winding-up of a company by a court if the company is unable to pay its debts. A company is deemed to be unable to pay its debt if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding 500 kyats then due, has served on the company a demand requiring the company to pay the sum so due and such company has for three weeks thereafter neglected to pay said sum. An application to the court for winding-up of a company may be by petition presented either by the company or by any creditors or contributories or by all or any of those parties, together or separately, or by the registrar of the CRO.

Section 69 of the TP Act states that the mortgagee has power to sell the mortgaged property in default of payment of the mortgage money, without the intervention of the court, subject to the conditions that: the mortgage is an English mortgage; the power of sale without court intervention is explicitly conferred on the mortgagee by the deed of mortgage; and a written notice demanding payment has been served on the mortgagor and default has been made by the mortgagor in payment of the principal money for three months after such notice or interest unpaid for three months after becoming due. Therefore, in connection with an English mortgage, a receiver may be appointed by a mortgagee pursuant to section 69 of the TP Act. In this regard, any person who has been named in the deed of a mortgage and is willing to act as receiver may be appointed by the mortgagee. If no person is named or if the person named is unwilling to act, the mortgagee may appoint any person to whose appointment

the mortgagor agrees, or if there is no condition for appointing such receiver, the court may make such appointment upon an application by the mortgagee. It is important to note that the power to sell without court intervention is available only if the mortgaged property is situated in the towns of Yangon, Mawlamyaing, Patheingyi and Sittwe. Creating mortgages on and the taking of immoveable property by foreign lenders is not allowed under Myanmar law and it is thus not the same as security transactions done by local lenders and borrowers.

6 Foreign exchange

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

Foreign currency exchange is mainly governed by the Foreign Exchange Regulation Act of 1947 and its rules. As such, the use of foreign exchange and all loan agreements, including every remittance of repayment of principal or interest pursuant to loan agreements require prior approval of the foreign exchange controller, who is the governor of the Central Bank of Myanmar under the Ministry of Finance and Revenue (MFR). Moreover, approval from the Myanmar Investment Commission (MIC) is also required if the borrower is operating a business under the Union of Myanmar Foreign Investment Law of 1988 (MFIL) or under the Myanmar Citizens Investment Law of 1994. In light of the foregoing, foreign lenders and companies must obtain approval of the Central Bank/MFR through the Myanmar Foreign Trade Bank (MFTB) or the Myanmar Investment and Commercial Bank (MICB) in connection with borrowing foreign exchange from abroad, repayment of the principal and interest thereof, making any payment to any person abroad, opening accounts at a foreign bank abroad or remittance of profits. At the time of writing bank charges are €10.

7 Remittances

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

Remittances of investment returns or any remittance of repayment of principal or interest in connection with loan agreements to parties in other jurisdictions may be made with the prior approval of the MIC or the Central Bank/Ministry of Finance and Revenue (MFR). Fifteen per cent withholding tax on interest payments made to overseas lenders must be deducted by the borrower in Myanmar. This withholding tax is a final tax under notification No. 41/2010 issued by the Ministry of Finance and Revenue dated 10 March 2010, which is effective from 1 April 2010.

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?

Myanmar 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?

Yes, project companies may establish and maintain foreign currency accounts in other jurisdictions and accounts locally with the approval of the MIC or the Central Bank/MFR.

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?

The state-owned Economic Enterprises Law of 1989 (SEE Law) specifies 12 economic activities that are allowed to be carried out only by the government such as exploration, extraction and sale of petroleum and natural gas and production of products of the same, postal and telecommunications services, air transport services, exploration and extraction of metals and export of the same, and electricity generating services. However, if it is in the interest of the state, the government may, on a case-by-case basis, by notification, specifically permit such restricted economic activities to be carried out through a joint venture with the government, or individually by any person or any economic organisation, subject to unspecified conditions. The minimum foreign capital requirement eligible under the MFIL is US\$500,000 for a manufacturing company and US\$300,000 for a services company. Depending on the economic activities to be carried out, as outlined above, approvals of the government and the MIC as well as relevant government ministries are necessary. Incorporation of a company or registration of a foreign branch must be done pursuant to the Special Company Act of 1950 (in the event of a joint venture with the government) or the MC Act. Regarding creditors, in the event of foreclosure on the project or related companies, creation of security interests in favour of a foreign lender requires approvals from the government, the MIC, relevant government ministries, the Central Bank/MFR.

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?

According to the TP Act, if the principal money secured is 100 kyats or more, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. If the principal money secured is less than 100 kyats, a mortgage may be effected either by a registered instrument signed and attested as mentioned above, or (except in the case of a simple mortgage) by delivery of the property.

As mentioned in question 2, every mortgage or charge created on immoveable or moveable property by a company must be registered with the registrar of the CRO under the MC Act, and also, mortgages on immoveable property must be registered with the Office of the Registration of Deeds under the Registration Act.

Generally, contracts including mortgage deeds may be made in English. As for translation and notarisation, translation of the instruments into Myanmar language and notarisation or legalisation may be required when asked by the relevant government departments at the time of filing the documents.

12 Government approvals

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

Depending on the types of project finance transactions related to investments, loans, operations, transactions and remittances by foreign parties or local companies, approval of one or several of the following – the government, the MIC, relevant government ministries, or the Central Bank/MFR – is required and may vary in form. Under Myanmar law, the taking or enforcement of security of shares or assets of companies in the oil and gas, mining, electricity or telecommunications industries is subject to prior approval of the foregoing authorities.

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?

It is a requirement that all insurance coverage be with Myanmar Insurance under the MFR. If the foreign company wants to maintain insurance with a foreign insurance company abroad, it may do so only with the permission of Myanmar Insurance. This is generally accomplished, in practice, when the foreign investor has worldwide coverage, by an agreement between the worldwide carrier and Myanmar Insurance. Such policies may be payable to foreign secured creditors if the foreign loan transaction is approved by the government, the MIC or the Central Bank/MFR.

14 Foreign employee restrictions

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

The employment of foreign experts and technicians by a company carrying out business under the MFIL must obtain the approval of the MIC. Foreigners are not allowed to be directors of Myanmar companies wholly owned by Myanmar citizens. Currently, as a matter of policy, transfer of shares owned by a Myanmar citizen or company in a Myanmar company to a foreigner or foreign company is prohibited.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

The importation of project equipment may be made subject to the customs laws and on payment of customs duty. If incentives are granted under the MFIL are obtained, there may be exemption or relief from customs duties on machinery, equipment, instruments, machinery components, spare parts and materials used in the business required for use during the period of construction. Also, the requirements to be fulfilled prior to importation of project equipment include compulsory registrations and obtaining export or import licences, which are controlled and administered by the Directorate of Trade under the Ministry of Commerce.

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 Myanmar laws relevant to nationalisation include the Agricultural Land Nationalisation Act of 1953, the Land Acquisition Act of 1894 and the Land Acquisition (Mines) Act of 1885. Most importantly, there is a provision in the MFIL expressly guaranteeing that an economic enterprise operating under the MIC permit shall not be nationalised during the term of the contract or during any extended term. Therefore, for example, a mining project operated by a foreign mining company formed under the MFIL and with a permit from the MIC is guaranteed not to be nationalised during the term of the contract or during any extended term.

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 investors wishing to carry out business in accordance with the MFIL can obtain the following incentives:

- exemption from income tax for up to three consecutive years

- from the date of commencement of commercial operation;
- where profits of the business are maintained in a reserve fund and are subsequently reinvested within one year after the reserve fund is made, exemption or relief from income tax on these profits;
- the right to accelerate depreciation with respect to machinery, equipment, building or other capital assets used in the business, at the rate fixed by the MIC, to the extent of the original value for the purpose of income tax assessment;
- if the goods produced by any enterprise are exported, relief from income tax of up to 50 per cent on the profits accrued on the export;
- the right to pay income tax payable to the state on behalf of the foreign mining company's employees and the right to deduct such payments from the assessable income;
- the right to pay income tax on the income of the foreign employees at the rates applicable to citizens residing within the country;
- where there are expenses incurred in Myanmar with respect to research and development relating to the business of the foreign mining company, a foreign mining company is granted the right to deduct such expenses incurred from the assessable income;
- the right to carry forward and set off losses for up to three consecutive years from the year the loss is sustained;
- exemption or relief from customs duty or other internal taxes on machinery equipment, instruments, machinery components, spare parts and materials used in the business and those that are imported and required to be used during the construction period; and
- exemption from customs duty or other internal taxes on import of such raw materials and additional import of machinery, equipment and spare parts which are actually required for operation of the business for the first three years of commercial production following completion of the construction.

There is no other significant incentive or tax provided preferentially to foreign creditors. The taxes applicable to foreign investments are income tax imposed under the Income Tax Law of 1974 and relevant notifications relating to income tax as well as the commercial tax imposed under the Commercial Tax Law of 1990 and relevant notifications relating to commercial tax. Security documentation is also subject to stamp duty and registration fees.

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?

There are various government ministries, departments and state-owned economic organisations under the relevant ministries having jurisdiction with respect to specific project sectors. Depending on project sectors, the requirements to obtain approvals from relevant ministries vary in addition to obtaining prior permits or approvals from the government or the MIC, as may be necessary. For example, the relevant government agencies or departments are the:

- Ministry of Energy and its subordinate agencies, such as, Myanmar Oil and Gas Enterprise in the oil and gas sector;
- Ministry of Mines and its subordinate agencies and departments, namely, No. 1 Mining Enterprise, No. 2 Mining Enterprise and No. 3 Mining Enterprise, the Department of Geological Survey and Mineral Exploration, and the Department of Mines, in the mineral sector;
- Ministry of Electricity No.1 and its subordinate agencies, including the Hydroelectric Power Implementation Department in connection with hydroelectric power plants; and
- Ministry of Communications, Post and Telegraphs and its subordinate agencies, such as, Myanmar Post and Telecommunications in connection with telecommunications.

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?

Myanmar is not a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards but is a signatory to the Geneva Convention. Myanmar enacted the Arbitration (Protocol and Convention) Act of 1937, which deals with a foreign arbitral awards and the Arbitration Act of 1944, which deals with domestic arbitration and arbitral awards made under arbitration agreements governed by Myanmar law.

The Arbitration (Protocol and Convention) Act of 1937 sets out, inter alia, provisions to be followed in enforcing foreign awards and establishes conditions for enforcement of foreign awards made on disputes relating to matters considered as commercial under Myanmar law. Under the Arbitration (Protocol and Convention) Act of 1937, any person interested in a foreign award may apply to a Myanmar court having jurisdiction over the subject matter of the award that the award be filed in court, and such application must be in writing and numbered and registered as a suit. A notice will then be given by the court to the parties to the arbitration other than the applicant requiring them to show causes why the award should not be filed. If the court is satisfied that the foreign award is enforceable under the Arbitration (Protocol and Convention) Act of 1937, it will order the award to be filed and proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree will then follow. The conditions for enforcement of a foreign award are that it must have:

- been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties;
- been made in conformity with the law governing the arbitration procedure;
- become final in the country in which it was made;
- made in respect of a matter that may lawfully be referred to arbitration under Myanmar law; and
- the enforcement thereof must not be contrary to public policy or Myanmar laws.

A foreign award is not enforceable if the court dealing with the case is satisfied that:

- the award has been annulled in the country in which it was made;
- the party against whom it sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented;
- the award does not deal with all the questions referred to; or
- the award contains decisions on matters beyond the scope of the agreement for arbitration.

The party seeking to enforce a foreign award must produce the original award, or a copy thereof, duly authenticated in a manner required by the law of the country in which it was made, and evidence proving that the award has become final and such evidence to prove that the award is a foreign award and that the conditions, as mentioned above, for enforcement of foreign awards are satisfied.

The Arbitration (Protocol and Convention) Act of 1937 and the Arbitration Act of 1944 do not specifically provide that any particular class or type of disputes will be subject to automatic domestic arbitration except that, as mentioned above, to enforce a foreign award it must have been in respect of a matter that may lawfully be referred to arbitration under Myanmar law.

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?

Joint venture agreements involving participation with government entities, sales contracts in connection with export or import transactions and applications and other project agreements concluded with government entities are governed by Myanmar law. However, foreign law, particularly the law of the lender country as the preferred law, may also be chosen as the governing law in loan agreements between the government and foreign entities.

21 Jurisdiction and waiver of immunity

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

The parties to a contract are not prohibited from submitting to the jurisdiction of foreign courts. However, under section 28 of the Contract Act, an agreement absolutely restricting a party from enforcing its rights under a contract by the usual proceedings in ordinary tribunals would be rendered void. A contract provision expressly excluding the courts from jurisdiction would, therefore, run the risk of rendering the contract void. There is a lack of precedent in Myanmar concerning how Myanmar courts deal with agreements containing choice a foreign law forum. Pursuant to section 13 of the CPC, a judgment of a foreign court is recognised in Myanmar except for the following cases where a foreign judgement is not conclusive:

- where it has not been pronounced by a court of competent jurisdiction;
- where it has not been given on the merits of the case;
- where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Myanmar in cases in which such law is applicable;
- where the proceedings in which the judgment was obtained are opposed to natural justice;
- where it has been obtained by fraud; and
- where it sustains a claim founded on a breach of any law in force in Myanmar.

Sovereign immunity can be expressly waived by state-owned economic enterprises or government entities by way of inclusion of such in a contract and the waiver of immunity clauses are effective and enforceable.

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?

In principle, title to natural resources in the ground is vested in the state. However, depending on the sector, project activities may be carried out and the rights thereto, including title to underground water as well as things growing on or living on land, may be enjoyed as permitted by law. For example, pursuant to the Myanmar Mines Law of 1994 and the Myanmar Mines Rules of 1996, rights to mineral resources by foreign or local investors may be acquired in the form of mining leases from the government. In this connection, the mineral production permit holder will have to strictly comply with the terms and legal provisions regarding the mining lease. As to mining leases for large scale mineral production, permits are granted for a maximum period of 25 years. Further extension for a period not exceeding five years at a time may also be granted by the Ministry of Mines with approval of the government. Various conditions will apply to the mining lease including the fact that the mining permit shall not be transferred by the permit holder without the permission of the Ministry of Mines or Department of Mines, and that the

prescribed dead rent and royalty must be paid to the government. A permit holder also has the exclusive right, in accordance with the conditions of the permit, to the minerals in the mining area.

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?

Royalty rates vary from sector to sector. Royalty payments in the mining sector are fixed by the Myanmar Mines Law, as mentioned below, while royalty payments in the oil and gas sector are made, in practice, by contractual obligations. Mineral production permit holders must pay royalties based on the value of the mineral sold at the time the sale takes place, under the Myanmar Mines Law and the Myanmar Mines Rules according to the rate specified by the Ministry of Mines in the conditions of the permit either in Myanmar currency or foreign currency, or both Myanmar and foreign currencies. It is the Ministry of Mines that decides on the currency in which the royalty is to be paid. With different minerals, the rates of royalty are different. There is no difference between royalties payable by domestic and foreign parties.

24 Export of natural resources

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

The export of certain natural resources requires approval of the relevant government ministries, for example, the export of timber requires approval from the Ministry of Forestry and Ministry of Commerce, export of minerals requires the approval of the Ministry of Mines and Ministry of Commerce, and an export or import licence must be obtained from the Ministry of Commerce. The export of natural resources will be subject to commercial tax at a rate of 8 per cent paid in foreign currency.

25 Environmental, health and safety laws

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

There are numerous laws, rules, regulations, orders and directives that cover various project sectors to be complied with. Depending on the project sector, there are various requirements under Myanmar law. For example, special project companies wishing to engage in oil and gas sector investment must comply with the directive of the MIC relating to environmental protection as well as environmental protection related laws and rules; companies conducting mining activities must meet the requirements in the Myanmar Mines Law and the Myanmar Mines Rules relating to working conditions, safety, health, environmental protection and other aspects; the requirements for the protection and preservation of cultural heritage must be observed under the Protection and Preservation of Cultural Heritage Law of 1998; approval from the Ministry of Forestry for commencing any project activities involving forest conservation will also be necessary under the Forest Law of 1992 and its Rules; and the provisions of labour-specific laws, including the Factories Act of 1951, relating to health and safety matters are required to be complied with. Also, project companies wishing to receive incentives under the MFIL will have to comply with the requirements of the MFIL.

26 Project companies

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

The business structures of project companies available under the MFIL are business organisations wholly owned by a foreign investor (this may be a sole proprietorship or a partnership or a limited

company), or a joint venture with a Myanmar individual, a private company, a cooperative society or a state-owned economic enterprise. If a joint venture is formed, the foreign capital to be brought in by the foreign investor must be a minimum of 35 per cent of the total capital. Project companies engaging in development, construction and hotels and the operation of such projects are commonly incorporated as private limited liability companies, approved by the MIC. Most commonly, financing in foreign currency from foreign lenders is the main source of financing available to project companies while domestic loans in local currency may be sought from government owned banks and private banks as permitted by Myanmar laws.

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?

There is partnership legislation in Myanmar enacted at state level namely the Partnership Act of 1932 which is in force across the whole country. According to the Partnership Act, the term 'business' includes every trade, occupation and profession, and 'partnership' is defined as the relationship between persons who have agreed to share the profits of a business carried on by all or any of them. As such, there may be partnerships in trade, occupations and professions.

Moreover, as mentioned in question 26, the business structures allowed to be formed in connection with foreign investment under the MFIL may be a sole proprietorship or a partnership or a limited company or a joint venture, although the projects relating to development, construction and hotels are commonly implemented in the form of private limited liability companies. The types of economic activities where foreign investment is allowed cover virtually all sectors, such as agriculture, livestock, fisheries, forestry, mining (no-metallic industrial minerals), industry, construction, transport, communication, trade and other economic activities to which the SEE Law applies in where permission of the government has been obtained. Business transactions relating to state projects are commonly carried out in the form of a joint venture.

28 PPP – limitations

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

According to the Procedures relating to the MFIL of 1988, if a business organisation is in the form of a partnership, the capital ratio and amount to be contributed by the partners, profit sharing ratio and rights and liabilities have to be described by the promoter or foreign investor in the proposal to be submitted to the MIC. In addition, a list of the names, citizenship, addresses and designations of the executives of the organisation, indicating the local and foreign capital ratio also need to be described and enclosed in such proposal.

The MFIL and its Procedures and the Partnership Act do not contain specific provisions requiring the partnership to be between the state and private participants. Most commonly, the joint venture is between a state entity and a foreign participant. It is at the sole discretion of the MIC whether the partnership may be allowed or not.

The Partnership Act, containing a number of sections, deals with the relations of partners to one another, relations of partners to third parties, incoming and outgoing partners, dissolution of a firm, registration of a firm and provides supplementary information. Under the Partnership Act, in brief, a partnership arises from contract and not from status. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, the real relationship between the parties, as shown by all relevant facts, will be taken into account.

Regarding rights and liabilities, a partner is liable to indemnify the firm for any loss caused to it by his fraud or his wilful neglect in the conduct of the business of the firm. The partners are not entitled to receive remuneration for taking part in the conduct of the business

and are entitled to an equal share of the profits earned, and must contribute equally to the losses sustained by the firm. There is also implied authority of a partner as an agent of the firm, binding them to the firm.

29 PPP – transactions

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

The formation of a joint venture between a state entity and foreign participant, and the notifications conferring powers to certain economic organisations to carry out economic activities under the SEE Law issued by the government are commonly published in the *Gazette*. However, there has been no notice published in the *Gazette* regarding the existence of a partnership in connection with state projects.

Update and trends

There are no central records of private infrastructure investment in Myanmar. According to the data of the Central Statistical Organisation under the Ministry of National Planning and Economic Development, foreign investment for 2008–2009 and 2009–2010 increased over that of foreign investment in 2007–2008. As such, it would seem that the financial crisis did not have a great impact on foreign investment in Myanmar, in part because foreign investment in Myanmar is low compared with other countries in the region. Foreign investment incentives allowed under the Foreign Investment Law are still available and have not been changed.

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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.



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1 Collateral

What types of collateral are available?

In principle, all types of collateral allowed to be provided as security in Vietnam are available for securing project finance transactions. Pursuant to Vietnamese laws, more specifically the Civil Code and the Decree on Secured Transactions, collateral can comprise objects, money, valuables papers and property rights.

Generally, collateral used within project financing includes immovable property (land use rights, properties attached to the land), moveable assets, contractual rights, onshore and offshore bank accounts and conditional assignment of equity. The collateral can also be property that arises in the future, for example a construction or agreement to be signed.

It must be noted that there is no private ownership of land in Vietnam. Land is owned by the people and administered exclusively by the state. Land use rights cannot in principle be mortgaged in favour of a foreign lender.

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 secured transaction needs to be established in writing and needs to be notarised or certified as agreed by the parties or if the law requires. It is usually recommended that the secured transaction be notarised, especially secured transactions involving real property such as mortgage of or guarantee by land use right must be notarised or certified by the local people's committee as the case may be.

Secured transactions become effective from the signing date except:

- if otherwise agreed by the parties;
- a pledge shall be effective from the time of transfer of assets being pledged;
- the mortgage of land use rights, forest use rights and ownership, aircraft and sea-going vessels shall be effective from the time of registration of the mortgage; or
- secured transactions shall take effect from the time of notarisation or certification if so required by law.

However, secured transactions will be effective against a third party from the date of registration.

Vietnamese laws require that the following secured transactions must be registered:

- mortgage of land use rights, forest land use rights, of ownership of planted forest land for production, of aircraft and ships, and of ownership registered assets;

- of a single item of property as security for performance of several obligations; and
- pledge of asset.

Other secured transactions can be registered if agreed by the contracting parties.

Priority is established by order of registration. If none of the secured transactions is registered, priority will be determined by order of establishment of the security transaction. The applicant must pay a fixed fee for notarisation or certification of security agreements and for registration of each secured transaction. In general, this fixed fee is a nominal amount (ie, US\$4 for registering one secured transaction).

It is possible for a corporate entity, such as an agent or trustee, to hold collateral on behalf of the project lenders as the secured party. There is no precedent of a bankruptcy of the collateral agent or trustee in Vietnam. However, the collateral is not an asset of the collateral agent or trustee. Therefore, this collateral shall be excluded from the estate of such collateral agent or trustee in case of bankruptcy. The parallel debt clause concept is not recognised in Vietnam.

3 Existing liens

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

It is common practice to perform lien searches. Such searches may be duly conducted with respect to secured transactions requiring registration. However, in the case of secured transactions not requiring registration, it could be more difficult for the creditor to get assurance as to the absence of liens because the creditor must rely heavily on information provided by the debtor.

With respect to the land use rights, the creditor can obtain mortgage information from the provincial agency for the registration of land and house. As regards to other assets, the creditor can search for security information at an office for the registration of secured transaction. There are three offices, located in Hanoi, Ho Chi Minh City and Da Nang City.

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 method of collateral enforcement is provided for in the security agreement. Before the enforcement of collateral, the realisor must provide written notice of realisation of the security property to other jointly secured parties at the addresses recorded at the security transactions registration office or must register the notice of realisation of the property in accordance with the law on registration of security transactions. If the parties have not agreed otherwise, in the case of moveable property, land use rights and property attached to land,

collateral (security property) shall be sold by auction (except where the value of the security property may be clearly determined on the market, the property may be sold at the market price without conducting an auction sale, subject to a notification to the securing party and the jointly secured parties, if any). If a single property is used to secure the performance of several obligations, notice of realisation of the secured property must be sent to jointly secured parties.

A lender can seize or sell secured property itself, or petition a court to permit it to do so in the case of disputes. When seizing a property, a lender must not apply any measures in breach of law or public order during the process of seizure.

Foreign lenders cannot seize or buy immoveable secured property.

A security property shall be realised within a time limit agreed by the parties; if there is no such agreement then the realisor shall have the right to make a decision on the time for realisation which shall not be earlier than seven days in respect of moveable property and 15 days in respect of immoveable property, calculated from the date of notice of realisation of the security property.

The sale could be for foreign currency if the purchaser is a non-resident in Vietnam as determined by the regulations on foreign exchange (eg, organisation under foreign laws, individual residing in Vietnam for less than 12 months or residing overseas, etc).

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?

In principle, a bankruptcy proceeding in respect of the project company has no major impact on secured lenders: debts secured by pledged or mortgaged assets which have been established before the petition for bankruptcy proceedings has been accepted by the court shall be given priority in payment by such assets. Where the value of the pledged or mortgaged property is insufficient to pay the debts, the remaining debts shall be paid during the asset liquidation of the project company. Where the value of the pledged or mortgaged property is greater than the debt, the difference in value shall be included in the value of the remaining assets of the bankrupt project company. The period for clawback rights is three months before a petition for bankruptcy proceedings is processed by the court. Other preferential creditors' rights with respect to the collateral are not related to the collateral.

To our knowledge, there exists no type of entity that is excluded from bankruptcy proceedings. There are also no other processes except court proceedings that are available to seize the assets of a business. To our knowledge, claims should be treated in the same way regardless of whether they emanate from foreign or local creditors.

6 Foreign exchange

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

The Vietnamese currency (dong) is not freely convertible into other currencies. From a Vietnamese law perspective, some foreign exchange transactions, such as opening offshore accounts and offshore direct payments, will need to be approved by the State Bank of Vietnam (SBV).

Also, all foreign loans of over 12 months have to be registered with the SBV. In this regard, foreign loans can be provided if such loans are within the quota of foreign loans that was approved by the relevant authorities for a specific project.

Transfer of foreign currency overseas is possible provided that such transfer complies with the purposes permitted by the foreign currency regulations, for example repayment of debt, payment in relation to offshore agreements, remittance of dividend or investment return. There is no fee, tax or other charges on foreign currency exchange imposed by the government.

7 Remittances

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

In general, payments of interests and charges by the project company to offshore lenders, including loans obtained from parents company, are subject to withholding tax of 10 per cent (although some bilateral taxation treaties may provide otherwise). Remittance of investment return is currently not subject to any restriction, specific tax or fee.

The project company is entitled to buy foreign currencies with its local bank to make lawful remittances. However, only in certain cases for large infrastructure-related projects, project companies may be granted a guarantee on the availability of foreign currency.

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 required to repatriate foreign earnings as long as they relate to the operations of the project. Such foreign earnings must not be converted to local currency. Nevertheless, these foreign earnings can be kept abroad in an offshore account of the project company if the project company was granted a proper authorisation from the SBV. The use of foreign currency including foreign earnings must comply with foreign currency exchange regulations in Vietnam.

9 Offshore and foreign currency accounts

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

The project company may establish and maintain foreign currency accounts locally at duly authorised banks. However, the opening of foreign currency accounts in other jurisdictions is only possible when it is expressly required by the lender and a prior approval from the SBV is required. Please note that such bank accounts may only be used for the receiving and paying of foreign loans or other purposes strictly authorised by the SBV.

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?

In principle, Vietnam has committed to maintain a policy of national treatment for foreign direct investment, subject to several restrictions applicable to sensitive sectors. Restrictions in terms of foreign ownership vary depending on which sectors the foreign investor will operate in. For instance, with regard to project finance transactions, foreign investors may invest without any restriction on ownership in the production of electricity. In contrast, foreign ownership is restricted with respect to the establishing of telecommunication network infrastructure, which requires state participation, and investing in the oil and gas sector in Vietnam.

To our knowledge, there are no provisions in any bilateral

investment treaties with key nation states or in other international treaties that may afford relief from such restrictions. Registration with governmental authorities is required at the start of any project.

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?

Loan agreements of over 12 months must be registered with the SBV in order to be legal (see question 6 on foreign exchange).

Certain secured transactions need to be notarised or certified and registered (see question 2). Although registration is not compulsory for all secured transactions, it is advisable to proceed with registration formalities because priority will be established by order of registration (see also question 2). Any document registered or filed with a government authority must be in Vietnamese language or include a Vietnamese translation.

12 Government approvals

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

In an infrastructure project transaction, several permits and approvals will be required. The main permits and approvals are as follows:

- special approvals from the government, such as an approval of award and formal notification of winning bidder (often applicable to build-operate-transfer (BOT) projects in the electricity sector), approval of project agreements, etc;
- investment approvals such as an investment certificate issued by the Ministry of Planning and Investment;
- SBV's approval or certificate for offshore bank accounts (if any) and for registration of foreign loan;
- approval of an environment impact assessment report; and
- one or more operating licences or approvals depending on sectors in which the investor will be operating, for example electricity permit, construction permit, mining permit, jetty permit.

Fixed and nominal fees are applicable for these licences, approvals and permits.

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?

According to the regulations applicable to the insurance business, only insurance companies duly licensed in Vietnam may provide insurance policies over project assets. A common arrangement in a project finance transaction is that the local insurance company provides insurance policies over the project assets and such local insurance company would then enter into a reinsurance arrangement with an onshore specialised reinsurance company. The specialised reinsurance company may make a retrocession with an offshore insurance company, provided that such reinsurer reinsures a part of the liability for which insurance has been accepted with the local insurance company. These policies may be directly payable to foreign secured creditors.

14 Foreign employee restrictions

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

There is no particular restriction on bringing in foreign workers, technicians and executives to work on a project (foreign employees)

provided that such foreign employees satisfy conditions applicable to the recruitment of foreign employees.

These conditions include notably technical skills, qualifications and professional experience. Please note that in order to work in Vietnam, foreign employees that will work for more than three months must obtain a work permit beforehand.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

In general, there is no restriction applicable to the importation of project equipment. However, the importation of project equipment must comply with provisions relating to the protection of the environment. The project company may enjoy custom duty exemption for equipment and materials used to form its fixed assets. No particular restriction exists on the importation of project equipment, except the importation of used equipment.

16 Nationalisation and expropriation

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

Several laws govern the issue of nationalisation or expropriation of foreign investments, as follows.

The 2005 Investment Law

The 2005 Investment Law stipulates that lawful assets and invested capital of investors shall not be nationalised or confiscated by administrative measures. In a case of real necessity for the purposes of national defence and security and in the national interest, if the state compulsorily acquires or requisites an asset of an investor, such investor shall be compensated or paid damages at the market prices at the time of that such compulsory acquisition or requisition is announced. Payment of compensation or damages must respect the lawful interests of investors and must be made on a non-discriminatory basis between investors. Any compensation or damages payable in relation to assets to foreign investors shall be made in a freely convertible currency and shall be permitted to be remitted overseas.

The 2005 Law on Enterprises

The 2005 Law on Enterprises provides that the lawful assets and invested capital of an enterprise and its owner shall not be nationalised or expropriated by administrative measures. In cases of extreme necessity where the state compulsorily acquires or requisites the assets of an enterprise for reasons of national defence or security and in the national interest, the enterprise shall be paid or compensated at the market price at the time the compulsory acquisition or requisition is announced. The payment or compensation must ensure the interests of the enterprise without discrimination as between types of enterprise.

The BOT Decree

The BOT Decree provides that investment capital and legitimate property of the investors shall not be nationalised or expropriated by administrative action. In necessary cases where acquisition and requisition of the state's property are required in accordance with the provisions the Law on Investment, the state must assure payment or compensation for property and capital of the investors at market prices or by other methods as agreed.

The procedures and conditions in relation to the expropriation are stipulated by the Law on Compulsory Purchase and Requisition.

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?

Tax incentives are usually related to corporate income tax and import duty. Under Vietnam tax and investment law, the level of tax incentives depends on both the sector of the investment and its geographical location. Foreign investors in infrastructure projects in the form of BOT, BTO and BT contracts will enjoy special investment incentives status, which include a concessionary 10 per cent tax rate for the duration of the project, a four-year tax exemption period plus nine years of a 50 per cent reduction in tax rate. In addition, these foreign investors are entitled to benefit an exemption on rental on land use rights. See question 15 in relation to the exemption of import duty.

In several special locations, a reduction of personal income tax can be also granted to persons working within the project company.

Finally, in certain special cases for large infrastructure-related projects, project companies could be granted a guarantee on the availability of foreign currency.

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?

For a typical project sector, authorisations would be required from both central level (government, line ministries) and local level (people committees of the city or province where the project is located and department of line ministries).

For example, the Ministry of Industry and Trade is mainly in charge of projects in the oil, gas, electricity and petrochemicals sectors; the Ministry of Natural Resources and Environment is in charge of investment in natural resources such as minerals extraction; water treatment would be under the management of the provincial people committee.

See also question 12.

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?

In 1995, Vietnam acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), with two reservations. The first permitted Vietnam to restrict the enforcement of international arbitral awards only to such awards involving a 'commercial dispute'; the second was that of reciprocity: Vietnam would recognise enforcement of foreign arbitral awards in Vietnam from countries not parties to the New York Convention only if those countries similarly recognised enforcement of arbitral awards from Vietnam.

Furthermore, according to the new Code for Civil Procedure, a decision of a competent court in Vietnam is required in order to enforce a foreign arbitral award in Vietnam provided that such arbitral award is not contrary to the basic principles of the laws of Vietnam. Vietnam is not yet a member of the ICSID Convention.

The dispute resolution mechanism provided under the 2005 Investment Law provides that any dispute to which one party is a foreign investor or an enterprise with foreign-owned capital or any dispute between foreign investors shall be resolved by one of the following bodies and organisations: a Vietnamese court; a Vietnamese

arbitration body; a foreign arbitration body; an international arbitration body; or an arbitration tribunal established in accordance with the agreement of the disputing parties (ad hoc arbitration).

The Investment Law also provides that any dispute between domestic investors or between a domestic investor and a state administrative body of Vietnam relating to investment activities in the territory of Vietnam shall be resolved at a Vietnamese court or arbitration body.

Non-commercial disputes are not arbitrable.

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?

The BOT Decree confirms the possible application of a foreign law as the governing law of project agreements which are guaranteed by the competent state authority, provided that the application is not contrary to the basic principles of the laws of Vietnam.

In practice, project agreements are often governed by Vietnamese law (notably the establishment and the operations of the project company), except that several issues (ie, interpretation, performance, breach, damages and settlement of disputes) can be governed by a foreign law. Either English or Singaporean law is often chosen to govern financing agreements, except for onshore security agreements, which are governed by Vietnamese law.

21 Jurisdiction and waiver of immunity

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

Under the 2005 Investment Law, any dispute to which one party is a foreign investor or an enterprise with foreign-owned capital or any dispute between foreign investors shall be resolved by one of the following bodies and organisations: a Vietnamese court; a Vietnamese arbitration body; a foreign arbitration body; an international arbitration body; or an arbitration tribunal established in accordance with the agreement of the disputing parties (ad hoc arbitration). A foreign court judgment would, in principle, not be recognised by a Vietnamese court, without looking at the merits of the case.

There is no clear legal basis for the sovereign immunity waived de jure by a sovereign entity in connection with a commercial relationship and through contractual arrangements. This issue should be confirmed by a legal opinion from the ministry of justice.

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?

In principle, natural resources including oil and gas, minerals, water and other natural resources located in the land, islands, internal waters, sea territory, exclusive economic zones and continental shelf of Vietnam are owned by the entire people and are uniformly managed by the state.

Private parties cannot 'own' these resources, but may acquire rights to conduct exploration, exploitation, mining, processing etc in accordance with applicable Vietnamese laws. Foreign investors may also acquire such rights subject to relevant regulations.

According to the Mineral Law, organisations and individuals permitted to mine or process minerals shall be responsible for combining the requirements of mineral mining or processing activities with the infrastructure construction, protection and rehabilitation of the local environment, ecology and land in accordance with approved feasibility studies. They shall also give priority to local people in the recruitment of labour for mineral activities and related services.

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 extraction of natural resources (excluding oil and gas which have a specific regime) is subject to royalties in Vietnam. The rate of royalty varies, from zero to 40 per cent, depending on the kind of resources. The basis for the calculation of royalties shall be the quantity of commercial resources actually exploited, the taxable value and the royalty rate.

Royalties applicable to crude oil vary from 6 to 40 per cent depending on the rate of production, and to natural gas they vary from 1 to 30 per cent depending on the rate of production. There is no distinction between the royalties on extraction payable by domestic and foreign parties.

24 Export of natural resources

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

Export of goods, including export of natural resources, shall generally be subject to export duties which basis and rate for each item are specified in the Export Tariff.

Export controls on natural resources are imposed to protect domestic supply and national security and, in practice, such control may be introduced by a specific export licence.

In the case of oil and gas, the investor may export its product share in petroleum in accordance with the petroleum contract without applying for an export permit, except in cases where the investor is required to sell in the Vietnamese market at the request of the government:

- natural gas owned by it, on the basis of agreements in projects for the development and production of gas; and
- a portion of its share of crude oil at an internationally competitive price.

Export of minerals is generally administered by the Ministry of Industry and Trade.

25 Environmental, health and safety laws

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

For all projects, the Law on Environment would apply regarding environmental issues and the Labour Code would apply regarding health and safety issues. The Ministry of Natural Resources and Environment and the Ministry of Labour, War Invalids and Social Affairs, respectively, are the regulatory bodies administering those laws.

Update and trends

Vietnamese law provides only a general legal framework for project financings. However, many matters need to be clarified by future legal documents, notably the following issues:

- a detailed mechanism and formal guidance to provide sponsors and lenders with confidence that step-in rights will be enforced for inclusion in project documents; and
- a guarantee in relation to the availability of foreign currency.

A PPP decree to be issued in 2010 may create a clear legal basis and more incentives for investors in infrastructure projects in Vietnam.

More specifically, for each project sector, the laws and regulations relating to each sector shall be applied. For example, in the oil and gas sector, the Petroleum Law would apply and for power generation and transmission, the Electricity Law would apply. For both these laws, the Ministry of Industry and Trade is the regulatory body. For the telecommunications sector, the Post and Telecommunications Laws would apply under the regulatory authority of the Ministry of Information and Communication. With respect to the transport sector, the applicable laws and regulations depend on the type of transport involved. In cases involving aviation, the relevant law is the Law on Aviation. The regulatory body administering this law is the Ministry of Transport.

26 Project companies

What are the principal business structures of project companies?

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

The Law on Enterprises of 2005 provides for five forms of corporate structure, namely:

- one-member limited liability company;
- limited liability company with two or more members;
- shareholding company or joint-stock company;
- partnership; and
- private enterprise.

For projects involving infrastructure projects in Vietnam, a limited liability company is the commonly chosen corporate form.

Principal sources of financing available to project companies are onshore or offshore bank lending and local financial leasing companies.



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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?

Except for the specific decree on investment under BOT, BTO, and BT structures, no specific PPP-enabling legislation has been enacted in Vietnam. A specific decree on PPP being prepared the ministry of planning and investment will be issued in 2010.

See also question 25.

28 PPP – limitations

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

See questions 17, 22, 23, 24, 25 and 27.

29 PPP – transactions

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

On the assumption that BOT projects are classified as PPP transactions, the most significant PPP transactions completed to date are two BOT power plant projects (Phu My 2-2 and Phu My 3, the capacity of each project is more than 700MW with an investment of more than US\$400 million) and the Phu My bridge project.



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