Project Finance USA 2022

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1. *Legal framework*

1.1 *Beyond general commercial and contract laws, what other specific laws and regulations govern project finance transactions in your jurisdiction?*

Project finance structures are commonly used in the US in the power, energy, telecommunications, and extractive sectors. No general body of law applies to project finance transactions, but each sector is highly regulated by a patchwork of laws and regulatory bodies that exist at the federal, state, and local level and that broadly cover the environment, health and human safety, market pricing, import and export, and foreign ownership, to name a few.

1.2 *Do any bilateral and/or multilateral international instruments have particular relevance for project finance transactions in your jurisdiction?*

Several multilateral investment treaties exist. Such treaties, like the United States-Mexico-Canada Agreement ("USMCA"), promote inbound foreign direct investments and offer a degree of protection to non-US investors. The US also has bilateral investment treaties and trade agreements with many countries.

1.3 *Beyond normal governmental institutions, are there regulatory bodies that play a particular role in project finance in your jurisdiction? What powers do they have?*

There is no overarching US authority for project development and finance. For the energy sector, the major authorities at the federal level include the Nuclear Regulatory Commission ("NRC") as to the licensing and administration of nuclear power plants and the Federal Energy Regulatory Commission ("FERC") as to the approval of facilities for interstate or foreign import, export, or transmission of oil, gas, and power. For example, development of a liquefied natural gas ("LNG") liquefaction export terminal requires an order by the Department of Energy ("DOE") authorizing the exports (easier to obtain for exports to countries with free trade agreements with the US) and authorization by FERC of the siting and construction of the facility itself. There are also significant authorities at the state and local level, including state energy siting commissions that may require regulatory approvals, state public utility or public service commissions, and local boards whose approval may be needed for siting and rights-of-way for electric generation and transmission projects. In particular, the state siting commissions take into account a number of factors regarding the economic and environmental impacts of a proposed project and solicit the views of diverse public and private stakeholders, including competitors and nongovernmental organisations.

Projects in other public utility sectors, such as telecommunications, water and wastewater, and transportation hubs and ports, are also subject to regulation by specialized bodies at the federal and state levels and by local governments with more general powers. Projects in private sectors, including mineral extraction, oil refining, and chemical manufacturing, are primarily regulated based on environmental, health, and safety considerations.

1.4 *What is the government's general approach to project finance in your jurisdiction? Is PFI/PPP a preferred model in your jurisdiction?*

There has been a general recognition of the need for increased infrastructure spending across the US in recent years. However, there are significant limitations on the PFI/PPP approach given the federal system and historical practice.

One limit on PPP in the US is that most projects would involve a partner at the state or local level, and states vary widely in their attitude towards PPP and the implementation of a legislative framework. PPP-enabling legislation in the United States exists mainly at the state and local government levels. Many states have authorized PPPs only for specific types of projects (such as transportation or utility projects).

States also differ as to whether they allow private entities to make unsolicited proposals for PPPs. Furthermore, PPPs face the risk of litigation, particularly for the first PPP executed under a given enabling statute.

Another limit on PPP is the established municipal bond market as an alternative. The cost of borrowing money in the U.S. is generally higher for private entities than for government entities because public entities can sell tax-free bonds, increasing the costs of PPPs relative to government-funded projects. To counteract this higher borrowing cost, PPP proponents emphasize that PPPs are structured to provide long-term cost certainty to public entities while shifting the risk of increased costs to the private partner.

The current national debate on infrastructure may lead to greater Federal involvement and possible legislation or other assistance, but outside of limited areas such involvement has been limited.

Important projects include Shikun & Binui's partnership with Texas to plan, finance, construct, operate, and upkeep a ten-mile stretch of highway, bridges, and fast toll roads in Harris County, Texas; University of Kansas's $350 million redevelopment of its central campus, which granted the private party a contract to operate and maintain the newly renovated buildings post construction; and the redevelopment of Long Beach's aging, deteriorating, and financially draining courthouse, which would have been financially infeasible without partnership.

2. *Project finance market*

2.1 *How mature is the project finance market in your jurisdiction?*

The US is one of the largest and most diverse markets for project finance with established market standards, a rich ecosystem of financing parties, and specialist participants.

2.2 *On what types of project and in which industries is project finance typically utilised?*

The US has established project finance structures commonly deployed in electric power projects, especially gas-fired, solar, and wind projects, and some pipeline projects. Private sector participants have also participated in state and local government infrastructure projects by financing or sharing ownership risks and benefits associated with toll roads, bridges, and airports.

2.3 *What significant project financings have commenced or concluded in your jurisdiction over the last 12 months?*

Of particular note in the energy space are Shikun & Binui's purchase of the Brazoria West Solar Project, Capital Dynamic's sale of the Beacon II and Beacon V solar plants, and CMS's purchase of a majority stake in Aviator Wind.

Shikun & Binui signed a purchase agreement to acquire 100% of Savion's 260-megawatt Brazoria West Solar Project. Shikun & Binui will complete the financing and construction of the Texas-based project. The electricity generated will power the equivalent of 37,100 Texas homes, and two power purchase agreements have already been negotiated with an industrial client and an energy trading company. In conjunction with TortoiseEcofin, Shikun & Binui purchased Capital Dynamic's California-based Beacon II and Beacon V. The two solar projects total 108 megawatts and will supply electricity to the Los Angeles Department of Water and power under two 25-year fixed-rate power purchase agreements.

CMS Enterprises is an energy investment company that focuses on utility-scale wind and solar. By purchasing a majority stake in Aviator Wind, a 525-megawatt wind project in Texas, CMS will support renewable efforts by Facebook and McDonald's.Finance structures.

3. ***Project financing structures***

3.1 *What project financing structures are most commonly used in your jurisdiction?*

In the US, the project finance structure revolves around the creation of a project company, usually a limited liability company, that holds all of the project's assets. In most cases, the equity interest in the project company will be held by at least one intermediate holding company created to pledge the project company's equity to the lenders in the eventual project financing. While the holding company will have a separate legal identity, typically it will not have any business apart from holding the equity of the project company. This structure allows for most liability to be contained at the bankruptcy-remote project company level.

3.2 *What are the advantages and disadvantages of these different types of structures?*

The prevalent structure is identified in the answer to question 3.1 above. The main advantage of project finance is the ability to limit lenders' recourse to the project sponsors and their assets. A well-structured project will limit the lenders' recourse to the project company assets and equity, including the contractual rights to eventual cash streams of the project and all assets required to own and operate the project. The extent to which recourse to a sponsor can truly be limited is always a key aspect of any negotiation. Different levels of project support unique to each project are not uncommon, especially during the construction and pre-operation phase. In addition, project financing may sometimes offer the ability to borrower higher amounts of debt relative to equity.

The main disadvantages of project finance are the high transaction costs of lender diligence, consultants, and documentation. As compared to general balance sheet or corporate-wide financing, project financings have more covenants that favor lenders, including lender consent around setting budgets, modifying commercial contracts, use of insurance proceeds, and broad changes in control.

3.3 *What other factors should parties bear in mind when deciding on a project financing structure?*

An important factor is the degree of co-ownership in the project company or in key counterparty relationships. Project finance transactions can take on some of the characteristics of a joint venture, with its attendant opportunities and challenges for governance, strategic alignment, and decision-making. In the power sector, another factor is the degree to which the project has assured revenues from a long-term offtake agreement or instead operates on a merchant power model.

4. *Industry players and ownership requirements*

4.1 *Who are the key players in project financings in your jurisdiction? Do any restrictions apply in this regard (eg, foreign ownership)?*

A variety of capital suppliers engage in project finance transactions. Traditionally, sponsors have been large, established players in the particular industry related to the project. However, private equity and other investment funds have increasingly become involved as sponsors. In the US, financing is generally provided by private financial institutions (commercial banks and investment funds) or through domestic capital markets. A wide variety of other participants, such as construction contractors, component suppliers, technology licensors, and output purchasers, may also be involved.

4.2 *What role does the state play in project financings in your jurisdiction?*

Historically, the federal government has not played a direct role in project financings. More typically, there have been PPP projects at a state and local level.

Federal and state governments do have certain limited approval, registration and licensing roles in addition to the application of general state and federal law and tax laws.

4.3 *Does your jurisdiction have nationalisation or expropriation laws in place? If so, what are the implications in the project finance context?*

The US Constitution provides that private property cannot be taken for public use without just compensation. This does not prohibit the taking of private property, but instead requires compensation in the event of a taking. In some extreme instances, government regulation of private property may be so onerous that it is tantamount to a direct appropriation requiring compensation. For example, the government might be required to pay compensation if regulations completely deprive an owner of all economically beneficial use of the owner's property.

In addition, investment treaties between the United States and other nations also contain expropriation clauses offering foreign investors protection against direct seizure or impairment of value.

5. *Regulatory and documentary requirements*

5.1 *What regulatory approvals are typically required for project financings in your jurisdiction? How are these typically obtained and what fees are payable?*

The siting and design of substantial projects usually will be subject to government review and approval requirements. For projects that include federal grant funding or are located on federal lands, the National Environmental Policy Act generally requires preparation of an environmental impact statement or other review document, including consideration of mitigation measures to reduce impacts. Approximately half the states and some localities have their own environmental impact review and mitigation requirements, applicable to project approvals by state and local agencies, including municipal governments. Various construction and operating permits are also required under the federal Clean Air Act and Clean Water Act and state laws. In many states, federally mandated permit programs are administered by state agencies, some of which impose requirements under state laws that are more extensive than those of the "federal floor." Projects located in or affecting water bodies and wetlands, coastal areas, historic and archaeological resources, habitat for endangered and threatened species, and other sensitive areas require additional federal, state, and, in some jurisdictions, local permits and approvals. Moreover, most local governments have planning and zoning laws, which require land use permits or other forms of approval for new projects or expansion of existing facilities and impose conditions on consistency with land use plans, noise, and other issues of local concern.

Specific types of projects require additional permits, licenses, and approvals for their activities. For example, electricity generating projects require regulatory approval for connection to the transmission grid.

Many regulatory agencies impose application processing fees to support program administrative activities. In addition, compliance with land use permit conditions and environmental mitigation requirements can add to project costs and should be considered at an early stage of project budgeting. The fees include the application charges and agency reimbursements, but they are often dwarfed by the costs of technical economic and environmental studies that are developed during the permitting process.

5.2 *What licences are typically required for project financings in your jurisdiction? How are these typically obtained and what fees are payable?*

See answer to question 5.1 above.

5.3 *What documentation is typically involved in a project financing in your jurisdiction?*

Contracts with respect to the development, construction, ownership, and actual operation will vary depending on the specific type of project. As a general matter in the US, all of these will be entered into by the project company. If development-stage contracts have been executed by the sponsor or one of its affiliates, it is important that the contracts allow for their assignment to the project company. There may also be several intercompany agreements between the project company and the sponsor or its affiliates. These may include an operation and maintenance agreement and a technology license agreement. In other cases, unrelated third parties may provide these services to the project company.

If intercompany agreements are used, they should be structured in such a manner as to track the material commercial terms that the sponsor could obtain with an unrelated third party providing the same services. Intercompany agreements can also have a significant impact on the total return of a project to its investors, so their economic terms must be carefully crafted. Assuming the key agreements are entered into with sponsor affiliates, they permit the affiliates to extract "arm's length" fees for the provision of key services and technology to the project company on a monthly or quarterly basis; these fees are frequently paid prior to repayment of debt.

5.4 *What registration or filing requirements apply for project financing documents to be valid and enforceable?*

There are few requirements to register or file documentation or otherwise comply with special legal formalities with respect to financing and project documents typical of US-based transactions (other than for documents related to real property). Power purchase agreements may be an exception and may need to follow certain formalities as required by a state public utility commission, including having the power purchase agreement formally approved by such a commission. There may be additional exceptions with respect to project documents depending on the details of the transaction at issue. For example, a lease or concession that is part of a PPP transaction may require certain formalities as codified by state or local law.

With respect to real property, a mortgage or deed of trust, once executed, is effective and enforceable between the parties to the transaction, but must be filed in the local recording office to provide sufficient notice to third parties as well as to perfect the lien. Government approvals are not generally required for granting a mortgage.

Outside those express formalities, the private parties are generally free to negotiate deal terms subject to general requirements of contract law and the charter and by-laws of the signatory parties. Virtually all jurisdictions require a notary to acknowledge the mortgagor's signature; some states require witnesses to the execution of the mortgage.

5.5 *Is* force majeure *understood as a legal concept in your jurisdiction?*

Yes, *force majeure* is recognized as a concept and is enforceable. An express *force majeure* clause should be inserted in the underlying documents in a consistent manner and will generally set forth a non-exhaustive list of events that would constitute *force majeure*, both natural (natural disasters) and anthropogenic (epidemics, war, terrorism, and labor disputes), as well as the impact on the rights of the parties if an event occurs. These clauses can be negotiated, and market standards can change. If a clause is successfully invoked, it will generally excuse one or both parties from performance of the project agreement, in whole or in part, or allow additional time for performance. *Force majeure* provisions generally will not act to excuse parties from any monetary payments that mature prior to the occurrence of the *force majeure* event.

6. ***Security/guarantees***

6.1 *What types of security interests and guarantees are available in your jurisdiction? Which are most commonly used and which are recommended (if different)? In particular, is the concept of a security trustee recognised (and if not, how are guarantees or security taken for multiple lenders)?*

Collateral security interests may be obtained over all real and personal property interests of the project company, including all present and after-acquired assets. It is also common to obtain a security interest in the equity interests of the project company itself. Real property assets may include complete or "fee simple" interests, leasehold interests, easements, as well as fixtures such as buildings. Personal property security interests range from equipment, inventory, contract and licensed rights, receivables and other rights to payment, bank accounts, securities, general intangibles (such as intellectual property rights) as well as proceeds of all of the foregoing. Rights in collateral are governed by federal law, the laws of the fifty states and the District of Columbia, and local laws within the states.

Generally, personal property security interests are governed by Article 8 (with respect to investment securities) and Article 9 of the Uniform Commercial Code ("UCC") in effect in each state. Although the UCC is intended to be a truly "uniform" commercial code, slight differences among the enactments in each state exist. Real property security interests are governed by the law of the state in which the property is located. Federal law is implicated with respect to the perfection of security interests in intellectual property such as trademarks, copyrights, and patents.

In addition to the assets of the project company itself, lenders will generally want the direct owners of the project company to pledge their equity interests in the project company to the lender. This provides a variety of advantages in the event of an enforcement action.

Contractual guarantees are available in a variety of formats and with or without various limitations. Specific legal doctrines and statutes exist in some jurisdictions to protect guarantors and need to be specifically waived in writing.

6.2 *What are the formal, documentary and procedural requirements for perfecting these different types of security interests?*

With respect to personal property, in order for the lender's security interest in the collateral to attach, the documents must include (as a standalone document or incorporated into another document) a "security agreement" that describes the collateral and the obligations being secured. For most types of personal property, filing a UCC-1 financing statement against the debtor and describing the collateral in the appropriate filing office perfects the lender's security interest in such personal property. For certain types of personal property, perfection must be obtained by control (see discussion of cash and accounts below).

With respect to investment property, perfection by filing provides some protection. However, in most cases lenders also take possession of the investment property to protect themselves against another party's gaining possession of the item and taking a competing security interest.

With respect to real property, state law will govern and will vary more than the UCC. A lien or security interest in real property may be created through a mortgage, deed of trust, deed to secure debt, leasehold mortgage, or leasehold deed of trust and the recordation of the instrument in the recorder's office in the county in which the real property is located. The filing must meet varying evidentiary requirements specified by the applicable jurisdiction (generally execution and notarization) and will always require a precise description of the property. In most States, the recording of real property instruments will also perfect a security interest in fixtures on the property; however, depending on the jurisdiction, a UCC-1 fixture filing may also be required and is generally advisable.

Intellectual property perfection is governed by a separate federal filing system.

6.3 *Can security be taken over property, plant and equipment in your jurisdiction? If so, how?*

Yes. These assets will generally be classified as real property and perfected as above. Equipment will be viewed as personal property or as fixtures.

For pipeline, electric transmission, railway and similar financings, it is also customary practice to file a central "transmitting utility" filing with the Secretary of State in the applicable State where the real property is located. This filing perfects a security interest in fixtures with respect to transmitting utilities throughout the applicable State and affords certain other benefits under the UCC.

6.4 *Can security be taken over cash (including bank accounts generally) and receivables in your jurisdiction? If so, how? In particular what types of notice and control (if any) are required?*

Yes with respect to both.

Perfection of rights in deposit accounts and money deposited in those accounts is achieved by control rather than by the filing of a UCC-1 financing statement. The accepted way to establish control is for the lender to enter into a control agreement with the debtor and the depositary bank. The control agreement generally has the debtor acknowledge control. The bank agrees to comply with instructions of the lender with respect to funds in the account, and the debtor is sometimes specifically allowed to exercise control until the delivery of a notice of control by the lender.

Perfection of rights to receivables and other payment rights will depend on the classification of the payments under the UCC. In almost all cases, the classification will allow perfection by filing a UCC-1 financing statement. However, for "commercial tort claims," the claims subject to the security interest must be specifically identified in the underlying document and notice of new claims given. In rare cases, such as letter of credit payment rights, perfection requires control through possession or notice and consent.

With respect to receivables, delivery of notice to the payee by the secured party will generally act to protect the payee from further liability to the debtor if it pays the secured party and the documents frequently specify when and in what manner notice may be given. Specific statutory notice requirements may apply with respect to receivables from the Federal government and other government entities.

6.5 *Is it possible to take security over major licences (particularly in the extractive industry sector)?*

Generally, yes. See the discussion of personal property above.

However, specific regulatory regimes may impose some limitations. For example, a security interest in some Federal Communications Commission licenses cannot be granted – security can only be taken in the proceeds of the license. Rights in extractive industry project finance transactions are typically held on the basis of mineral leases rather than licenses.

6.6 *What charges, fees and taxes (including notary and similar fees) arise from the perfection of a security interest or the taking of a guarantee?*

Depending on the relevant state and local laws, recording fees and taxes for perfecting a security interest in certain property may apply.

Filing fees and the costs of service providers are required for all UCC filings, although these costs are fairly low in the project context. Real property perfection may involve a variety of state and county fees and expenses, which generally include per-page recording fees and fees for notarization of signatures and in certain states may include recording taxes, stamp taxes, etc. These recordation taxes are generally determined based on the amount secured by the property lien.

Because of the complexity of the real estate recordation system and established practice, lenders generally also require a title insurance policy from a specialist insurer, which will insure the priority of lien. These policies generally are determined by reference to state law and can represent a significant expense compared to other legal costs in taking the security.

6.7 *What are the respective obligations and liabilities of the parties under security documents?*

The underlying documents will generally specify a variety of standard representations and covenants binding on the debtor regarding the validity, perfection, and priority of the security interests taken. These documents also require the debtor to maintain the collateral and the validity of the liens and to undertake certain further assurances with respect to the security.

Premature action and self-help by a lender with respect to collateral can expose the lender to legal liability under a variety of theories depending on the circumstances.

6.8 *In the event of default, what options are available to enforce a security interest or guarantee? Is self-help available in your jurisdiction in connection with the enforcement of security or must enforcement action be pursued through the courts?*

Enforcement of a security interest in the project company's personal property is governed by the remedies available under the UCC and, in the case of investment property, by state and federal securities laws.

If the lender has taken a pledge of the equity of the project company and the equity owners do not object, the lender has the option of strict foreclosure, where the lender accepts the equity in exchange for satisfaction of all claims (the project debt) secured by the equity. This gives the lender control of the project company without, in theory, court involvement.

In the absence of strict foreclosure, it is theoretically possible to take possession of property governed by the UCC without court proceedings if this can be done without a breach of the peace and disposed of subject to certain constraints, such as through a private foreclosure sale. However, this may prove difficult or risky in the project context. Such sales are required to meet a commercially reasonable standard requiring sale in the usual manner on a price determined by a recognized market, which may not be achievable for some or all of the collateral. In particular, sales of equity are unlikely to meet the UCC test for private sales. An exception might be cash collateral held in accounts governed by a control agreement.

With respect to real property, while foreclosure laws vary from state to state, there are two primary methods that a lender may use to foreclose on real property. Judicial foreclosure requires court involvement and a judicially supervised sale. Some states allow statutory foreclosure without judicial involvement subject to certain requirements (which can include a public sale).

6.9 *What other considerations should be borne in mind when perfecting a security interest or taking the benefit of a guarantee in your jurisdiction?*

Given the federal system and varying legal jurisdictions and rules, it is vitally important to conduct due diligence with respect to the collateral and check for prior liens in all applicable jurisdictions, consulting local counsel as to state law if required.

It is important to distinguish between perfection and enforcement of a security interest. Although a lender may be perfected in certain contract rights, the lender may also seek consents to assignment from the project company's counterparties. Such a consent agreement contains an acknowledgment by the counterparty of the lender's security interest in the contract and sets forth the agreed upon terms pursuant to which the counterparty will recognize performance under the contract by the lender or its designee following the exercise of remedies.

6.10 *What other protections are available to a lender to safeguard its position in connection with security or guarantees?*

As noted above, lenders should attempt to get a pledge of equity from the project company's owners or sponsors.

6.11 *Are direct agreements with contractual counterparties well understood in your jurisdiction?*

Yes, lenders regularly enter into direct agreements with contractors, suppliers, and licensors to protect their interests in the project company's rights under contracts and facilitate enforcement of security and obtaining substitute performance.

7. *Bankruptcy*

7.1 *How (if at all) do bankruptcy proceedings impact on the enforcement of security by a creditor?*

Bankruptcy is generally governed by the federal US Bankruptcy Code governing reorganization and liquidation proceedings. As a general rule, commercial entities may be subject to liquidation and reorganisation proceedings, typically under Chapter 7 or 11 of the US Bankruptcy Code, respectively. Foreign and local creditors have equivalent standing under the US Bankruptcy Code.

Once a bankruptcy case is commenced under the Bankruptcy Code in respect of a debtor, the Bankruptcy Code imposes an "automatic stay," which immediately enjoins all enforcement outside of the bankruptcy court against the debtor, including enforcement of security by a perfected secured creditor. Bankruptcy courts have broad discretion and may extend the automatic stay to assets not owned by the named debtor or to other entities.

A secured creditor may petition the bankruptcy court for relief from the automatic stay under certain circumstances. Additionally, the rights of a secured creditor with respect to the collateral will generally be recognized by the bankruptcy court, and in theory they are given "adequate protection" of their interests in the collateral. Sales of collateral outside of the ordinary course (such as sales of inventory collateral) will require an order of the court and will generally involve an auction in which the creditor will in most cases be allowed to credit-bid its claim against the debtor. However, bankruptcy proceedings are heavily dependent on facts and circumstances and can be complicated and time consuming.

7.2 *In what circumstances can antecedent transactions be unwound for preference? What other similar measures apply in this regard?*

Prior transactions can be unwound under the Bankruptcy Code. Under the code, a grant of security interest is considered a "transfer" and is subject to being challenged as either a "preference" or a "fraudulent transfer" and then rejected (or "avoided").

A lender's security interest in a project company's property may be avoided as a preference if (i) the lender perfects the security interest during the 90 days (or one year, if the lender is an "insider" of the project company) preceding the commencement of the project company's bankruptcy case, (ii) that transfer is made for or on account of an antecedent debt owed by the project company to the lender, (iii) the transfer enables the lender to receive more than it otherwise would have received in a liquidation of the project company, and (iv) the lender has no affirmative defense (which includes that the transfer was a contemporaneous exchange for new value, that the lender gave subsequent new value, or that the transfer was in the ordinary course of business) to such preference.

A constructive fraudulent transfer claim can be asserted to avoid a transfer that the project company made to the lender if both (i) the project company made the transfer in exchange for less than reasonably equivalent value, and (ii) the project company at the time of the transfer was, or was thereby rendered, insolvent, inadequately capitalized, or unable to pay its debts as they matured. Fraudulent transfer claims do not require actual fraud and can be made under the Bankruptcy Code (with a lookback period of two years) or state law (where the lookback periods can be longer).

8. ***Project contracts***

8.1 *Are project contracts in your jurisdiction typically governed by local law?*

Yes. Project contracts will be governed by the law of a specific state.

8.2 *What remedies are available to a project company for breach of the project contract?*

The remedies options ultimately include an action for money damages and, in certain limited circumstances, an action for injunctive relief. But the agreements often provide a panoply of additional remedies, including the right to stop work or withhold loan disbursements, acceleration of indebtedness, rights to perform work and charge other participants for the costs, and enforcement of warranties, guaranties, letters of credit, and surety bonds.

8.3 *Are liquidated damages provisions in project contracts enforceable?*

A liquidated damages clause will be enforceable if the actual expected damages were not readily ascertainable at the time when the parties entered into the agreement and the fixed sum is reasonably proportionate to the probable loss.

8.4 *Are there any public policy considerations which need to be taken into account when assessing the enforceability of project contracts?*

There are a variety of federal and state laws embodying public policy that cannot be abrogated by the parties' agreement. Covenants not to compete, interest rates, releases of unknown or future liabilities, and indemnification obligations covering the indemnified parties' own culpability are among the clauses most frequently affected by these policies.

9. ***Project risk***

9.1 *What risks typically arise in project financings in your jurisdiction and how are these best mitigated?*

Key risks to be managed in a project finance and development transaction include cost overruns, completion delays, failure to achieve output, efficiency and emission guarantees, counterparty defaults, increased interest, changes in currency exchange rates, taxes, customs duties and government impositions, changes in the law more generally, property and liability claims, and casualties. The general principle is to allocate the risks in each of these areas to the party that can most efficiently bear them or further transfer them via contract, insurance or otherwise.

9.2 *How significant is political risk in project financings in your jurisdiction? How is this best mitigated?*

Changes in regulatory regimes or attitudes of state and local governments towards particular projects may present risks and have to be evaluated. However, as a general rule, participants have not sought, and have not received, specific protection against political risk from the Federal government or otherwise.

10. ***Insurance***

10.1 *What types of insurance arrangements are typically put in place for project financings in your jurisdiction?*

The project company itself will procure or cause its counterparties to procure a broad array of property and liability insurance, including builders' all risk property insurance, commercial general liability insurance, workers' compensation insurance, and specialty coverages for transportation, professional liability, and environmental hazards.

10.2 *If local insurance is required, can local insurers assign offshore reinsurance contracts in your jurisdiction?*

Insurance is often required to be provided by insurers admitted in a particular state, but reinsurance arrangements are common in the global marketplace.

10.3 *What other forms of insurance feature in the project finance market in your jurisdiction?*

A common practice in project finance transactions is the adoption of an owner-controlled insurance program (OCIP), where the project company procures insurance that benefits the other participants for onsite risks. The compensation to the counterparties is then intended to exclude duplicative premium costs.

11. ***Tax***

11.1 *What taxes, royalties and similar charges are levied in the project finance context in your jurisdiction?*

The general range of income taxes, sales taxes, use taxes on equipment, transfer taxes (in some jurisdictions), customs duties, and excise taxes throughout the US applies to project finance transactions as well. The type of project will determine which taxes are applicable, and project finance participants engage in sophisticated analysis of the tax planning alternatives.

Royalties and severance taxes are charged for use of government resources, including mineral leases for oil, gas, and extractive industry properties. Statutes fix some royalty rates, but the Department of the Interior can modify them for particular resource leasing programs.

11.2 *Are any exemptions or incentives available to encourage project finance in your jurisdiction?*

Yes, but incentives are asset and area dependent. A particularly fruitful area of incentive is tax equity and tax credit investing. All projects will benefit from tax depreciation. However, some asset classes have shorter depreciation periods, and depreciation does not match the useful life in these areas. Occasionally, the US grants bonus depreciation or 100% writeoff, which allows parties to take a percentage of the asset's value and start depreciating it up at time zero. Project structures can move depreciation, deductions, and other valuable tax attributes to the party or parties who can best use them and compensate others for their benefit.

In addition to broader US tax policy, which is used to incentivize behavior, states also create asset class-based incentives. These range in specificity from California's low carbon fuel tax credit to general tax credits and property tax exemptions for certain asset classes.

11.3 *What strategies might parties consider to mitigate their tax liabilities in the project finance context?*

The key consideration is to allocate tax burdens in accordance with the parties that will recognize the greatest value for them. Another consideration is to cause the incidence of tax payments to occur in the jurisdictions where the project is located. Tax liabilities and incentives differ by locale in the US, but projects should make use of the incentives available to mitigate tax burdens. When applicable, projects can be sited in jurisdictions with lower tax burdens or greater tax incentives. Additionally, the project vehicle and its business structure can be tailored to mitigate tax liability depending on the project's parties.

12. ***Governing law and jurisdiction***

12.1 *What law typically governs project finance agreements in your jurisdiction? Do any specific requirements apply in this regard?*

Project documents are typically governed by (i) the law of the state in which the project is located; (ii) the law of the state in which one or more of the project parties is organized; or (iii) the law of a state with a highly developed commercial legal system, such as New York. As to financing documents, New York law is the dominant choice by far. Real property-related finance documents, such as mortgages, sometimes contain split-law choice of law provisions, with the law of the state in which the property is located governing the creation, perfection, and enforcement of the security interest and New York law governing the other provisions of the document.

12.2 *Is a choice of foreign law or jurisdiction valid and enforceable? In the case of a choice of foreign law of jurisdiction, will any provisions of local law have mandatory application? Are submissions to jurisdiction provisions that operate in favour of one party only enforceable?*

Choice of foreign law is possible but rare in domestic project finance, and federal, local, or state law may nonetheless govern particular aspects with respect to operations or collateral. For example, federal environmental laws and any applicable regulatory framework would apply to domestic operations, and perfection with respect to collateral would generally be governed by state law.

The parties' agreement to submit disputes in a foreign jurisdiction is generally effective and enforceable unless it is unfair or unreasonable. Such an agreement will be disregarded if it is the result of overreaching or unfair use of unequal bargaining power or if the foreign jurisdiction would be seriously inconvenient.

12.3 *Are waivers of immunity enforceable in your jurisdiction?*

The Foreign Sovereign Immunities Act codifies an exception to immunity through explicit or implicit waiver. For government contracts of a commercial character, a waiver of sovereign immunity in the project development context is generally effective and enforceable.

12.4 *Will foreign judgments or arbitral awards be enforced in your jurisdiction? If so, how?*

Both federal and state courts in the United States apply a consistent, well-articulated policy of recognizing and enforcing both foreign and domestic arbitration awards. The US federal policy strongly favors the enforcement of arbitration agreements and the confirmation of arbitration awards.

The United States is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the Panama Inter-American Convention on International Commercial Arbitration ("Panama Convention"). The Federal Arbitration Act ("FAA") is the federal substantive law applicable to both international and domestic arbitration of contractual provisions and awards. It includes enabling provisions for both the New York Convention and the Panama Convention.

Actions to enforce an arbitration provision, or to confirm or vacate an arbitral award under the FAA, may be brought in either state or federal courts. The United States is also a signatory to the Washington Convention, which creates the framework for the International Centre for Settlement of Investment Disputes ("ICSID").

13. *Foreign investment*

13.1 *What taxes and other charges are levied on foreign investors in the project finance context in your jurisdiction?*

The US generally requires withholding of US Federal income tax at a rate of 30% on payments of interest, dividends, and other amounts (as opposed to return of capital through principal) to foreign persons. However, various treaties may reduce or eliminate these withholding taxes. In addition, interest paid to non-bank foreign persons is exempt from this withholding tax if certain requirements are satisfied, including that the loan is not in bearer form and the lender is unrelated to the borrower.

Regardless of exemptions, the Foreign Account Tax Compliance Act ("FATCA") may still subject interest paid to US Federal withholding tax at a rate of 30%. To avoid such withholding, if the amounts are paid to a foreign financial institution (even as an intermediary) that financial institution must have either entered into an agreement with the IRS to provide information on potential US account holders and withhold tax on certain payments or resides in a jurisdiction that is party to a recognized intergovernmental agreement to implement FATCA. The institution must also certify to the payor that the institution is eligible to receive payments free of FATCA withholding. If the amounts are paid to a non-financial foreign entity, such entity must (i) provide a certification that such entity does not have any "substantial United States owners," or (ii) provide certain information regarding the entity's "substantial United States owners," which will in turn be provided to the US Internal Revenue Service.

13.2 *Are any incentives available to encourage foreign investment in the project finance context?*

Generally, none. Individual states have a wide range of tax and fiscal incentive schemes for projects with attractive local employment opportunities, whether domestic or foreign owned.

13.3 *What restrictions and requirements apply with regard to the remission of foreign exchange? Are local companies permitted to maintain offshore bank accounts?*

Generally, the US government does not impose exchange controls or taxes on the exchange of foreign currency. However, economic and trade sanctions imposed by the rules of the Office of Foreign Assets Control ("OFAC") of the US Department of the Treasury should be consulted. Further, the US government monitors substantial foreign exchanges and requires persons involved in such transactions to make full and accurate disclosure of these exchanges.

The United States does not prohibit offshore accounts, but the Internal Revenue Service ("IRS") requires US persons who have an interest in or signature authority over foreign financial accounts to declare such accounts with holdings over $10,000 by June 30 of each year. Accounts of non-US entities controlled by a US company may need to be reported under these rules. Penalties for non-compliance can be significant.

13.4 *What restrictions and requirements apply with regard to the import of plant and machinery?*

Goods imported into the United States must clear customs and are subject to a customs duty, unless specifically exempted by law. The Harmonized Tariff Schedule sets forth the rates of duty for each imported item. US Customs and Border Protection ("CBP") does not impose an obligation on an importer to acquire a license or other certification, but importers may be subjected to such requirements by other agencies, depending on the nature of the import. CBP also enforces health, safety, and technical standards for imported merchandise.

There can also be additional non-tariff duties imposed on imports due to unfair trade practices such as dumping or subsidisation, as administered by the Tariff Act of 1930 (as amended), which provides for anti-dumping and countervailing duties.

The Department of the Treasury Office of Foreign Assets Control ("OFAC") administers US embargoes and economic sanctions, which can include certain prohibitions on imports, in addition to restricting financial and other transactions with certain countries, individuals, or entities.

13.5 *What restrictions and requirements apply with regard to foreign workers and experts?*

Employers in the United States, including project developers, should confirm each newly hired employee's identity and lawful right to work in the United States for that specific employer in the intended position.

When choosing to hire personnel who are neither US citizens nor lawful permanent residents (green card holders), it is critical for a project developer to understand the applicable rules and the nature of documentation that can be presented by a foreign national to evidence their lawful right to work in the United States for that specific business. Non-immigrant visas, which are temporary in nature and not intended to result in green card issuance, can include visitors, students, and trainees. Bilateral treaties and other exemptions may apply to senior management positions.

It is also important to note the law regarding the use of contracted personnel. Although much of the risks and liabilities associated with contract workers is maintained by the contractor assigning the worker, in recent years the government has increased the responsibilities, notice requirements, and many of the liabilities of the project developer accepting the contract personnel as well.

A related issue is whether a foreign national will require an export license to work on a project. This can occur if he or she will be provided access to military or dual-use commercial technology that may be export-controlled. This is because providing technology to a foreign national, even within the United States, can be viewed as an export to the foreign national's home country.

13.6 *Is your jurisdiction party to bilateral investment and withholding tax treaties which might facilitate foreign investment?*

The United States has concluded a number of bilateral treaties that protect investor and taxpayer rights.

14. *Environmental, social and government (ESG) issues*

14.1 *What is the applicable environmental regime in your jurisdiction and what specific implications does this have for project financings?*

Environmental matters are governed by a number of federal, state, and local laws. The Environmental Protection Agency ("EPA") administers the principal federal laws, though the EPA regularly delegates authority to state agencies. The most material laws include those set forth below.

The Clean Water Act's ("CWA") National Pollutant Discharge Elimination System permitting program delegates authority to either the EPA or approved federal or state agencies to issue permits that regulate discharges to waterbodies. In addition, the CWA's Oil Pollution Prevention Regulation requires certain facilities to prepare Spill Prevention Control and Countermeasure plans.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") grants the EPA broad authority to address hazardous substances that might endanger the environment and enables the EPA to compel parties responsible for environmental contamination to clean up the sites. However, petroleum is exempt from the CERCLA.

The Clean Air Act ("CAA") regulates air emissions and subjects new facilities and significant modifications to existing facilities to extensive permitting and performance standards for emissions controls.

The federal Solid Waste Disposal Act and its 1976 amendment, known as the Resource Conservation and Recovery Act ("RCRA"), regulate the management and disposal of solid waste and especially hazardous waste. With respect to oil and gas operations, a number of production wastes are specifically excluded from hazardous waste regulation, and states also generally consider these wastes to be non-hazardous solid wastes.

The Endangered Species Act can prohibit activities that might materially impair the habitats of threatened and endangered species. For example, a new facility might be prohibited in an area with an endangered plant species, or particular mitigation measures (such as habitat replacement or augmentation) might be required to minimise adverse impacts to an animal species.

14.2 *What is the applicable health and safety regime in your jurisdiction and what specific implications does this have for project financings?*

Federal rules governing the health and safety of workers are generally implemented and enforced by the Occupational Safety and Health Administration ("OSHA"). State and local governments also promulgate and enforce rules protecting employees and contractors from workplace injuries. OSHA imposes certain inspection and safety program requirements involving mechanical integrity of equipment, hazards analysis, and process safety. OSHA inspects facilities and has the power to issue citations for violations.

The Department of Homeland Security ("DHS") implements requirements relating to safety and security under the Maritime Transportation Security Act of 2002 ("MTSA") and the Chemical Facility Anti-Terrorism Standards ("CFATS"). The MTSA requirements include development of site security plans, designation and management of certain information as sensitive security information ("SSI"), and security clearances for personnel. Particular sectors have additional health and safety regimes.

14.3 *What social and ethical issues should be borne in mind in the project finance context?*

The social and ethical issues that are in play for financing generally are also relevant in the project finance context. A project's financial sustainability and performance should be assessed to ensure follow through, viability, and maintenance of creditworthiness. The project should further be compatible with broader principles of stakeholder engagement and environmental justice. Generally, project proponents should ensure that sponsors are in a position to perform, and that performance will not disproportionately or unjustly harm any class of stakeholders.

15. ***Trends and predictions***

15.1 *How would you describe the current project finance landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?*

The next year is slated to be incredibly exciting from a project finance standpoint, as the legislative landscape is in the process of changing. The Infrastructure Investment and Jobs Act of 2021 is an ambitious $1.2 trillion package to help rebuild America's bridges, roadways, and public transit systems. More is expected in the proposed reconciliation bill. Similarly, President Biden has made proposals for tax credits in the energy space, such as a production tax credit for low carbon hydrogen. More broadly, the American Jobs Plan proposed a ten-year extension and phase down of an expanded direct-pay investment tax credit and production tax credit for clean energy generation and storage. Senator Wyden and Representative Thompson both have bills to increase and modify investment tax credits and production tax credits for green energy facilities. It is still too early to know the ultimate form these tax and direct-pay incentives will take. However, if implemented, they will provide a rich set of incentives for a wide variety of projects.

16. ***Tips and traps***

16.1 *What are your top tips for the smooth conclusion of a project financing in your jurisdiction and what potential sticking points would you highlight?*

Each project financing is unique and comes with its own participants, assets, and structure. Understanding the particular deal and tailoring financing to meet its specific needs is key to a successful outcome.

Similarly, not all project participants are the same, and a project's risks and rewards are not borne by the sponsor alone. Understanding the parties, as well as the risks and rewards that they stand to bear, is vital to ensuring that the project financing is viable and appropriate. Further, this diligence to understand the project and the parties should be performed early to make sure that the project is technically, environmentally, and economically feasible and capable of servicing returns commensurate to its risk profile. Doing so decreases the risk of sunk costs given project finance's high transaction costs.

Maintenance of a positive relationship with the other parties privy to a project finance assists in the diligence and the project itself. A good working relationship aids in understanding the other parties, their motivations, and the risks they are willing to undertake. Further, organization and positive relationships are especially vital when working with multiple parties that occupy the same role, e.g., co-owners or multiple lenders, because this can lead to questions of governance and other complexities.