GETTING THE DEAL THROUGH

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United States

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1 Collateral

What types of collateral are available?

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 of the project company itself. Real property assets may include complete or 'fee simple' interests, leasehold interests and 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 and, 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 50 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 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 certain assets including intellectual property such as trademarks, copyrights and patents.

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?

Most collateral for US project financings will consist of personal property governed by the UCC and real property. The following discussion sets aside more specialised collateral types such as aircraft, railcars and other 'rolling stock', motor vehicles, certain maritime vessels and contracts with the US government.

Real property security interests

Security interests in real property are perfected by filing a mortgage instrument in the applicable filing office of the state or county in which the property is located. This filing creates a public record that serves as notice to third parties. Mortgage instruments may be simply a 'mortgage' in some states and a deed of trust or deed to secure debt in others. Regardless of its name, the purpose of the recorded instrument is to grant a lien on the property to be encumbered, describe that property and the debt secured, and identify the debtor and the secured party. The rest of the mortgage is privately negotiated, with covenants and representations usually tailored to real property-related topics, because other project terms are dealt with in the primary credit or common terms agreement among lenders. Other than for certain regulated utilities, governmental approvals are not typically required in connection with a mortgage.

Priority among creditors with respect to mortgages is governed by state law, generally based on recordings that are first in time or first without any prior notice of existing claims. However, priority may be affected by state laws applicable to mechanics liens and unpaid real estate taxes, and by inter-creditor subordination agreements.

The taxes and fees payable in connection with mortgage filings vary among states and within cities and counties of the states. Techniques for minimising such taxes include modifying an existing mortgage that may exist on the real property, rather than reconveying the mortgage. However, for most greenfield project finance transactions, there will be no prior mortgages on file that are capable of being modified in this manner.

Personal property security interests

Many types of personal property security interests subject to the UCC can be perfected by filing a financing statement in the state-level office (often the secretary of state) of the state in which the project company is organised. For non-US project companies, the filing office is the Washington, DC, recorder of deeds. However, filing a financing statement is not sufficient for other types of collateral where perfection can only be achieved through possession or control, as in the case of deposit accounts or project finance waterfall accounts established through a depositary. Perfection by control is usually achieved through a control agreement with the deposit bank or depositary granting the secured party exclusive control over the account to the exclusion of any other person. As between the project company and the secured party, the exercise of this right is usually limited to periods of time following a defined trigger event (such as in event of default). Although it is possible to perfect a security interest in investment property by filing, most secured parties take the extra precaution of obtaining possession of certificated securities in order to avoid another party gaining possession of the item and taking a competing security interest.

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 acknowledgement 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 recognise performance under the contract by the lender or its designee following the exercise of remedies. Many states exclude security interests in insurance policies from their UCC. However, insurance payable to the project company or the lender for loss of, defects in, or damage to, the collateral, is considered 'proceeds' of collateral and a security interest in proceeds automatically attaches to the collateral.

There are many rules governing priority of UCC security interests and several notable exceptions where control over certain collateral will prevail over filing. In the context of a project financing where significant diligence will be attended to in connection with prior liens, the most important rule is that, as between perfected security interests, the secured party that files its financing statement or obtains perfection otherwise first wins: the 'first-to-file-or-perfect' prevails.

Fees payable in connection with UCC filings in almost all states are de minimis (with Florida being a notable exception). If there is an administrative agent or trustee for the lenders, that agent or trustee would commonly be a party to the security documents on behalf of the secured parties and the secured party of record for purposes of UCC and mortgage filings. Title to assets, which are being pledged to a collateral agent or trustee in a project financing, remains with the project company and if there were ever a bankruptcy of the agent or trustee, the project company's assets would be excluded from the agent's or trustee's estate (assuming standard collateral security documentation).

3 Existing liens

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

Other than with respect to intellectual property (for which searches of registries can be conducted through the US Patent and Trademark Office and the US Copyright Office) and certain transportation assets, there is no federal registry of either land titles or of personal property security interests.

To assure itself of the priority of liens on real property, lenders rely on title insurance procured through the private insurance industry. This involves procuring and purchasing a preliminary report through the insurance company that identifies previously recorded liens on the property, if any, such as prior mortgages, a mechanics, judgment or tax lien as well as other recorded easements and similar encumbrances. It is also possible to purchase a survey showing the location of certain recorded encumbrances on the property. Then, the project company, the lender, or each of them will purchase a title insurance policy insuring the status of title as shown on the preliminary report (after taking steps to remove or cure certain defects appearing in the preliminary report).

To assure itself of the priority of its liens on personal (UCC) property, a lender may conduct searches of the applicable filing offices for prior liens. The accuracy of the results of these searches is usually capable of being certified by the filing office. If prior liens are discovered, further diligence is necessary to determine if such liens are material or remain in existence. Once a lien has been terminated, it is possible to remove the lien filing from the public records by filing a termination statement that is authorised in accordance with the UCC. Private sector companies provide lien search results and also conduct searches for judgments, bankruptcy and tax liens. The extent to which liens can be uncovered prior to closing by conducting a filing search is a function of the date on which the search is conducted. Accordingly, it is possible for new liens to arise after a search has been conducted. To this end, lenders usually update their search results near the financial closing date and also rely on representations that there are no liens other than permitted liens. It is possible, though not common in the project finance context, to also obtain insurance as to the absence of liens on personal property types of collateral.

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?

In project financings in the United States, lenders aspire to obtain collateral security over the broadest pool of collateral available. Accordingly, the lenders' security interest would extend to the assets of the project company (both real and personal property) as well as the equity held by the project company sponsor(s). In an enforcement proceeding, the lender will elect whether to foreclose on the project equity or on the assets.

Enforcement of a security interest in the project company's equity is governed by remedies available under the UCC, and by state and federal securities laws. Foreclosure on the equity and other applicable UCC collateral may be achieved by allowing the lender to accept the equity in exchange for satisfaction of all claims (the project debt) secured by the equity. This is known as strict foreclosure. Although it is possible to foreclose on equity interests and other UCC collateral by selling it in a private foreclosure sale, most project company equity fails to qualify under the UCC tests that permit private sales. This is because a private foreclosure sale is only permitted where the collateral is customarily sold on a recognised market or the subject of a widely distributed price quotation. A recognised market is one where prices are not individually negotiated, such as the New York Stock Exchange. The general legal standard that all creditors are required to comply with in connection with UCC foreclosures is that the entire process be commercially reasonable. A sale is commercially reasonable if it is made in the usual manner on any recognised market, at the price current in any recognised market, and is otherwise in conformity with reasonable commercial practices among dealers of similar property.

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. In judicial foreclosure, a lender files an action with the local court for a judgment ordering that the real property be sold at a public auction that is judicially supervised. The court also mandates that the proceeds are applied to satisfy the underlying debt. In statutory foreclosure, a lender may foreclose on the real property without commencing judicial proceedings, however, mortgages with a power of sale clause generally require that the real property be publicly sold (eg, through an auction). By satisfying the statutory requirements, a lender may be permitted to privately sell the real estate and apply the sales proceeds to satisfy its debt. In states that allow statutory foreclosure, the lender may elect either method of foreclosure sale.

Lenders possess statutory rights that enable them to protect their interests in the mortgaged real estate. If a lender establishes that a mortgagor is not sufficiently managing the property, then a court may appoint a receiver to preserve that property for the benefit of the lenders and mortgagor during the foreclosure period.

Generally, a lender may 'credit bid' its debt in a foreclosure sale. A lender may bring an action against the mortgagor for a deficiency judgment if the proceeds from the sale of foreclosed property are less than the amount owed. However, several states have enacted a 'one form of action rule' to restrict deficiency judgments and coordinate the order of remedies.

State law sometimes affords defaulting mortgagors either an equitable or a statutory right of redemption, which allows the mortgagor to 'redeem' the real property from the foreclosing lender by repaying the lender for missed payments and interest and other costs associated with the foreclosure. The right to equitable redemption terminates after a valid foreclosure. Conversely, a statutory right of redemption (available in some but not all states) survives for a fixed period after the foreclosure sale has occurred and allows the mortgagor to redeem the foreclosed real property by paying the price paid at the foreclosure sale.

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 US Bankruptcy Code governs reorganisation and liquidation proceedings in the United States for both individuals and business entities such as corporations, limited liability companies, and partnerships. As a general rule, commercial entities may be subject to liquidation or reorganisation proceedings, typically under chapter 7 or 11 of the US Bankruptcy Code, respectively.

Certain state laws provide for non-judicial foreclosures, allowing lenders to foreclose on mortgages without a court proceeding. However, most jurisdictions do not permit seizure of assets outside of court proceedings and generally bar a deficiency claim following a non-judicial foreclosure.

Foreign and local creditors have equivalent standing under the US Bankruptcy Code. The US Bankruptcy Code also permits US recognition of foreign insolvency proceedings undertaken abroad and allows agents of foreign debtors to obtain assistance in the United States in connection with such proceedings.

As discussed above, the commencement of a bankruptcy case by a project company may pre-empt or stay state law foreclosure actions given that, in general, an automatic stay provision is applicable to companies in a US bankruptcy proceeding. A lender may seek relief from the automatic stay to continue or commence its state law foreclosure rights by reaching an agreement with the representative for the project company or through noticed motion, and in either case, following the approval of the US Bankruptcy Court. The US Bankruptcy Code includes provisions addressing preference periods and fraudulent conveyance and therefore claw back rights of creditors may arise with particular facts or circumstances. Preferred liens to secured lenders in a US project financing generally arise from taxes and mechanics liens.

In addition, a debtor under the US Bankruptcy Code may file a motion for the Bankruptcy Court to determine the current market value of a lender's collateral. If the debtor can demonstrate that the fair market value of the collateral has decreased, the debtor may be able to recategorise a portion of the lender's loan as unsecured and repay such unsecured portion pro rata with other general unsecured creditors.

6 Foreign exchange

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

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.

7 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

A foreign investor may generally remit US profits abroad and repatriate equity or debt capital investments. The United States maintains a list of countries, companies, and individuals that are subject to sanctions and embargoes. The Treasury Department restricts payments and remittances to such entities (exceptions may be granted by the federal government). Dividends, interest, royalties and service fees may be subject to US withholding tax. The rate of such withholding tax is 30 per cent unless a lower treaty rate applies. In the case of interest, a zero per cent statutory rate may apply in many situations (but typically not to interest payments on intercompany debt).

In addition, the foreign account tax compliance provisions of the Hiring Incentives to Restore Employment Act (FATCA) will impose a US federal withholding tax of 30 per cent on 'withholdable payments' to foreign financial institutions and other non-US entities that fail to comply with certain certification and information reporting requirements. 'Withholdable payments' are payments of (i) US-source interest dividends, rents, royalties and other so-called fixed or determinable annual or periodic income (FDAPI); and (ii) the gross proceeds from the sale or other disposition of assets that can produce US-source interest or dividends. Under current US Treasury Department regulations, the obligation to withhold under FATCA will apply to (i) US-source FDAPI paid on or after 1 July 2014; and (ii) gross proceeds from the disposition on or after 1 January 2017 of property that can produce US-source interest or dividends. Also, under those regulations, FATCA will not apply to any payment under a debt obligation issued before, and not the subject of a significant modification on or after, 1 July 2014, nor to the gross proceeds from the disposition of such an obligation.

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?

US companies may (but are not required to) repatriate foreign earnings. Even if not repatriated, foreign profits, especially passive income (such as interest), may be subject to taxation in the United States on a current basis.

9 Offshore and foreign currency accounts

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

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 US$10,000 by 30 June 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. There are no longer any restrictions in the United States on offering foreign currency deposits.

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 United States allows open foreign direct investment and has entered into a number of bilateral and multilateral treaties to broaden investment opportunities and protect for foreign investors. One example is the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States. Protection of investors against expropriation is discussed in the response to question 16. One example of protection under NAFTA is the provision requiring each NAFTA party to treat investors from other NAFTA countries and their investments no less favourably than the country's own investors or their investments and investors or investments of third parties. NAFTA also requires that each NAFTA party treat foreign investments in accordance with international law principles, requiring 'fair and equitable treatment' and security.

Nonetheless, foreign investments in the United States are somewhat restricted. The most notable barrier to foreign investments in the United States is the Exon-Florio Provision, as amended by the Foreign Investment and National Security Act of 2007 (FINSA). The Exon-Florio Amendment to the Defense Production Act of 1950 authorises the president to block or unwind a foreign investment when there is credible evidence that the transaction at issue is a threat to US national security. To obtain approval for a given transaction, the parties may be required to divest certain sensitive assets or agree to comply with other risk mitigation measures. For decades, the Committee on Foreign Investment in the United States (CFIUS), established by executive order, has been responsible for reviewing foreign investments in US assets for national security concerns in areas such as defence and high technology. The controversy regarding the acquisition of management contracts for several US ports by Dubai Ports World, a state-owned company based in the United Arab Emirates, raised concerns about the Exon-Florio review process. Congress responded by passing FINSA, which reformed the longstanding Exon-Florio process. The implementing regulations of FINSA (Final Rules) became effective in late 2008.

FINSA did not change the general structure created by the Exon-Florio Provision. FINSA authorises the president to review, and suspend, prohibit or unwind, based on national security concerns, mergers, acquisitions, and takeovers by or with a foreign person that could result in 'control' of a US business by that foreign person. However, FINSA codified the existence of CFIUS and various aspects of its structure, roles, and responsibilities and those of complementary governmental agencies involved in the review process. Further, FINSA expanded the illustrative list of national security factors that CFIUS may consider when conducting a review. This list includes consideration of the impact of the transaction on US critical infrastructure, such as major energy assets, and whether the foreign entity acquiring the assets is controlled by a foreign government.

The International Economic Emergency Powers Act also grants the president authority to investigate, regulate and prevent the acquisition of US companies by foreign entities. This process, however, requires a declaration of an 'unusual and extraordinary threat' to national security. Federal laws also impose restrictions on foreign investment to protect national security, for example, in the development of natural resources on federally owned lands or of nuclear power, and foreign investments involving the transfer of advanced technology. Additionally, there are separate restrictions in the agriculture, energy, communications, transport and defence sectors.

Finally, the United States historically has had a number of restrictions on foreign ownership of real property, though many states have eliminated such restrictions. The remaining limitations are primarily in the western states and apply only to property conducive to specific uses, such as agricultural, mining or forest lands.

The federal government and many states have enacted specific laws that require foreign acquirers to file reports disclosing ownership of real property in the United States. These laws are typically used to gather information and do not directly affect the foreign acquirer.

Companies owned by US or foreign investors are subject to the same tax regime. Earnings or debt service payments made to foreign investors may be subject to withholding taxes at a rate of 30 per cent, subject to tax treaty or statutory reduction. In addition, if the project company is a US real property holding company, tax liability accrues upon the sale of such 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?

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 that may require certain formalities as codified by state or local law.

With respect to real property, as stated in the response to question 2, a mortgage, once executed, is effective and enforceable between the parties to the transaction, but the mortgage 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 and some states require witnesses to the execution of the mortgage.

12 Government approvals

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

Necessary permits depend on a range of variables such as the location, sector and size of the project. Any particular project may require a number of approvals, licences, permits and consents on the federal, state, regional and local level.

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 programmes 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, licences 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 programme 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.

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?

In the United States, insurance companies are regulated by state rather than federal government, and insurance regulations vary from state to state. In general, however, insurers must be qualified to do business in each state in which they issue insurance policies. Policies issued by insurers that satisfy the highest degree of state regulatory scrutiny ('admitted' insurers) are often also partially guaranteed by state insurance guarantee funds in the event that the insurance company becomes insolvent. Insurers that satisfy a lesser degree of regulatory scrutiny may nevertheless be permitted to conduct business in a state (as 'surplus lines' insurers), although their policies lack public backing, and the state in which such a policy is issued may levy a 'surplus lines tax' (ranging from 1 to 6 per cent of the premium, depending on the state) that is added to the premium charged to the insured. In the event of disputes over payment of claims, foreign insurance companies will generally be subject to the jurisdiction of US courts, especially if the insurance policy does not contain any contractual provision requiring disputes to be resolved by private arbitration or in the foreign forum. Like insurance company regulations, the law applicable to insurance claim disputes varies significantly from state to state, with the law in some states being relatively favourable to the insurance company and the law in other states being pro-policyholder. In many states, the insured may be entitled to collect its attorneys' fees and punitive damages if it prevails in a claim dispute with its insurer.

A federal excise tax on the amount of the premiums paid to foreign insurance companies applies to casualty insurance and indemnity bonds at the rate of 4 per cent, and to reinsurance at a rate of 1 per cent, subject to reduction or elimination by tax treaty. In addition, many states charge foreign insurers a premium tax on policies that are issued in-state, although this tax is generally charged directly to the insurer and not to the insured.

14 Foreign employee restrictions

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

All employers in the United States, including project developers, must confirm each newly hired employee's identity and lawful right to work for that specific employer in the intended position. The Federal laws requiring this action were established in November 1986 as part of the Immigration Reform and Control Act (IRCA) and apply equally to US citizens and permanent resident workers and foreign national personnel. Recently, certain states, cities and municipalities have enacted additional compliance requirements businesses must follow to hold business licences within those regions of the country. Failure to properly document the review of appropriate employment verification documents can result in substantial fines most often calculated based on the number of personnel employed.

When choosing to hire personnel who are not US citizens nor lawful permanent residents (green card holders), it is critical for a project developer to understand the rules established by IRCA 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, trainees and employment categories. Commonly used employment based non-immigrant visas include:

- the L-1 classification used for executive, managerial or personnel with specialised skills and knowledge that is transferred within a corporate group from a location abroad to a related US subsidiary, affiliate or branch location;
- the H-1b classification used for positions classifiable as 'specialty-occupations', which require college-level degrees in a specific field of study to perform the duties and responsibilities of the position;
- the specialised visas created by treaty for citizens of Canada, Mexico, Singapore, Chile and Australia with similar standards to the H-1b classification; and
- the E classification for executive, managerial or personnel with essential skills and knowledge who are of the same nationality as the intended employer and are nationals of one of 82 countries with whom the United States maintains specialised treaties.

In some cases a foreign national who lacks employment authorisation in the United States can enter in the B-1 (Business Visitor Classification) to represent the interests of a foreign employer. However, a foreign national cannot provide local productive employment while in the United States, but rather can only further the goals of the company abroad.

It is also important to note many recent changes in 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 licence to work on a project, which can occur if he or she will be provided access to 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. Export licences for defence technology subject to the International Traffic in Arms Regulations (ITAR) are issued by the Department of State, those for commercial technology with potential military application (dual use) subject to the Export Administration Regulations (EAR) are issued by the Department of Commerce and those for certain nuclear technology are issued by the Department of Energy. For certain categories, the Department of Homeland Security now requires that human resource managers certify whether an ITAR or EAR licence is required when applying for a visa for the foreign national.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

Some important restrictions on the import of equipment include those set forth below.

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 licence 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.

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 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 both direct seizure and against impairment of value. One example is the North American Free Trade Agreement (NAFTA), which prohibits expropriation of an investment in a given host country unless such expropriation is undertaken for a public purpose, is carried out on a non-discriminatory basis, occurs in accordance with due process of law and is accompanied by prompt and adequate compensation.

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?

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.

States may impose fees as well as taxes on filing or registration of mortgages or other 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?

There is no overarching US authority for project development and finance, and different industry sectors are subject to varying levels of government regulation. 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) authorising the exports (easier to obtain for exports to countries with free trade agreements with the US), authorisation by FERC of the siting and construction of the facility itself and approval of the onward transmission of gas in the US market. FERC also regulates rates for electric transmission projects and natural gas pipelines, which can determine whether a project can be financed. There are also significant authorities at the state and local level, including regulatory approvals by state energy siting commissions, 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, transportation hubs and ports, are also subject to regulation by specialised bodies at the federal and state levels and by local governments with more general powers. Projects in private sectors, including minerals extraction, oil refining and chemical manufacturing, are primarily regulated based on environmental, health and safety considerations.

Many of the key project development sectors have experienced both public and private ownership. The power sector was formerly occupied by investor-owned utilities subject to extensive public utility regulation and by publicly-owned generators such as the Tennessee Valley Authority and Bonneville Power Administration. Waves of deregulation have introduced a large number of privately owned independent power producers and wholesale generators exempt from general public utility commission oversight. Similar patterns of public, public utility and private ownership have occurred in the other project sectors.

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?

The United States is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Panama Inter-American Convention on International Commercial Arbitration (the Panama Convention). The Federal Arbitration Act (the FAA) is the federal substantive law applicable to both international and domestic arbitration 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) Convention and the North American Free Trade Agreement (NAFTA) treaty, which provides for the arbitration of investment disputes between non-US investors and governmental entities in the United States.

Both federal and state courts in the United States apply a consistent, well-articulated policy of recognising and enforcing both foreign and domestic arbitration awards. The US federal policy, embodied in the FAA, strongly favours the enforcement of arbitration agreements and the confirmation of arbitration awards. Note that, while the FAA pre-empts inconsistent state arbitration statutes, state law may address matters that are not covered by the FAA. All 50 states have enacted arbitration statutes, some of which specifically address international arbitration. Grounds for challenging an arbitration award under the FAA are quite narrow. The exclusive grounds for vacation of an arbitration award are articulated in section 10 of the FAA. Specifically, an award may be vacated under the FAA only:

- where the award was procured by corruption, fraud, or undue means;
- where there was evident partiality or corruption in the arbitrators;
- where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or

- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

However, recent US Supreme Court rulings have cast doubt on the continued viability of the previously recognised independent ground for vacating an award on the basis of 'manifest disregard of the law'.

Only one of the US Circuit Courts of Appeals has continued to recognise 'manifest disregard' as an independent ground, while several have ruled that it is no longer available as an independent ground.

In general, all types of commercial disputes common to project finance transactions can be heard in an arbitration proceeding. The scope of the arbitration will be determined based upon the language of the agreement to arbitrate.

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 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 organised; 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.

21 Jurisdiction and waiver of immunity

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

An agreement by parties to submission of a dispute 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. A waiver of sovereign immunity in the project development context, for government contracts of a commercial character, is generally 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 the United States, title to oil, gas and minerals is generally held by the owner of the surface until and unless that right is severed and granted to others. This title to the mineral estate may be separated from the surface estate by a grant or a reservation. When the mineral estate has been severed from the surface estate, the mineral estate owner holds what is referred to as the 'dominant estate', and the surface estate owner holds the 'servient estate'. In general terms, this means that the mineral estate owner has the right of reasonable access to and use of the surface estate in order to exploit the minerals.

In Louisiana, the only civil law state in the United States, mineral rights do not exist as a separate, perpetual estate in land, but rather can only be held separately from the surface in the form of a 'mineral servitude'. The servitude gives its holder the right to enter the property and extract the minerals, but it may expire, or prescribe, after 10 years of non-use.

Both the federal government and many states own oil, gas and mineral rights both onshore and offshore. Government and private transfers frequently reserve to the grantor all or a portion of the mineral rights, so the land title records must be carefully reviewed.

Water rights are generally governed by state law. For bounded bodies of water, the rights to the water are governed by either (or both) the riparian doctrine or the prior appropriation doctrine. Under the riparian doctrine, a person whose land is adjacent to a body of water is entitled to reasonable use of the water. Prior appropriation jurisdictions are generally located in areas where water is scarce, and landowners in these areas obtain rights in and priority to the water supply by actual beneficial use.

The right to groundwater is governed by four doctrines. The absolute ownership doctrine grants the owner of the surface land the right to remove an unlimited quantity of water. The reasonable use doctrine grants the landowner the same privileges as the absolute ownership doctrine but limits groundwater extraction for export purposes if the removal harms other persons with rights to the same aquifer. The appropriative rights doctrine is the groundwater equivalent of the prior appropriation doctrine. The correlative rights doctrine, generally only used in California, allocates surface owners reasonable amounts of water for personal use, who are treated as joint tenants of the groundwater.

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?

Federal leases impose a fixed royalty of a defined fraction of the amount or value of the oil or gas removed or sold from each lease. A royalty rate of one-eighth was common up until the 1970s, although now rates such as three-sixteenths or one-sixth are more common. For onshore operations, the federal rate must be no less than one-eighth, whereas offshore rates tend to be higher subject to the various statutory requirements.

Statutes fix most federal royalty rates, but both the Department of the Interior and special legislation (such as the Deep Water Royalty Relief Act) can modify standard terms, usually by reducing the stated royalty rate or suspending payment of royalties, to make frontier development more attractive. State and private leases have more variability in their royalty terms, and may include a basis for payment other than proceeds or market value. States reap varying portions of the royalty for federal leases of land within or adjacent to their borders.

Natural resource operations are subject to applicable state and federal taxes (such as taxes on business profits), in addition to severance taxes assessed by the states regarding certain land. These taxes generally do not vary for domestic and foreign parties, but federal law restricts direct foreign ownership of federal mineral leases. There are no broadly imposed federal taxes for the extraction of natural resources, however, a federal coal excise tax (capped at 4.4 per cent of the sales price) applies to coal producers.

24 Export of natural resources

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

Relevant export controls include the following:
- natural gas exports require prior approval from the Department of Energy;
- domestically produced crude oil requires a licence from the Department of Commerce for the export of crude oil to all countries, including Canada; and
- exports of certain natural resources with potentially dangerous or harmful applications are restricted by the Department of Homeland Security (DHS).

No general taxes are imposed on the export of natural resources.

The United States maintains economic embargoes on certain countries, including Cuba, Syria, Iran, Libya and Sudan, pursuant to regulations administered by the Treasury Department's Office of Foreign Assets Control. These embargoes can prohibit US persons and foreign persons from engaging in transactions involving the embargoed countries or their companies or nationals, even when nothing will be imported into or exported from the United States.

25 Environmental, health and safety laws

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

Environmental

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 programme delegates authority to either the EPA or approved 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 (the CERCLA) grants the EPA broad authority to address hazardous substances that might endanger the environment and enables EPA to compel parties responsible for environmental contamination to clean up the sites. However, petroleum is exempt from the CERCLA.

The Clean Air Act (the 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 (the 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.

Health and safety

Federal rules governing the health and safety of workers are generally implemented by the Occupational Safety and Health Administration (OSHA) and state and local governments all enforce rules protecting employees and contractors from workplace injuries. OSHA imposes certain inspection and safety programme requirements involving mechanical integrity of equipment, hazards analysis and process safety. OSHA inspects facilities and has the power to issue citations for violations. Recently, OSHA issued the largest citation in its history – over US$87 million – after finding that the oil refinery had failed to correct previously cited safety hazards.

The Department of Homeland Security (DHS) implements requirements relating to safety and security under the Maritime Transportation Security Act of 2002 (the MTSA) and the Chemical Facility Anti-Terrorism Standards (the 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.

The Bureau of Safety and Environmental Enforcement (BSEE) has the authority to inspect, investigate, levy penalties, and oversee safety, response and removal preparedness for offshore oil sites. This authority was previously vested with the Minerals Management Service, however, this agency was divided into three separate agencies in response to the Deepwater Horizon oil spill.

26 Project companies

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

The principal business structures are corporations, limited liability companies and limited partnerships. Many project sponsors favour the limited liability company because it combines the limited recourse of a corporation with the pass-through taxation attributes of a partnership. Project companies are not limited in their sources of financing, however, the principal source is traditional commercial, project-finance, limited recourse bank debt. Although the project bond market has not been that robust in recent years, sometimes there is a tranche of capital markets debt that is on equal footing with bank debt. As the market for private-public partnerships develops (see responses to questions 27 to 29), sources of taxable and tax-exempt government-supported debt financing may become more available and common. Last, many sponsors and developers have also been able to finance a larger portion of projects in equity markets by attracting tax-equity investors who are attracted to and able to monetise the generous tax incentives (eg, accelerated depreciation) available to certain renewable energy projects.

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?

PPP-enabling legislation in the United States exists mainly at the state and local government levels. Such legislation varies in scope among the 50 states and not all states have enacted PPP-enabling legislation. A recent survey indicated that 32 states have some form of PPP-enabling legislation. Additionally, several states have continued to expand and refine their PPP-enabling legislation including Florida and Maryland, opening up opportunities for a wider array of PPP projects in the future. However, many states have authorised PPPs only for specific types of projects (such as transportation or utility projects), or only allow a limited number of projects to be implemented under each enabling statute. PPP enabling legislation for roadway projects has become more prevalent in recent years for projects financed with toll revenues, and many such projects include the construction and operation of high occupancy toll lanes adjacent to existing highways. However, variation in enabling legislation between states can be an impediment to the use of PPP structures as PPP project proposals require significant diligence to understand the risks of the particular authorising legislation in the jurisdiction at issue.

States also differ as to whether they allow private entities to make unsolicited proposals for PPPs. Further, nine states that authorise PPPs require that the state legislative body approve the PPP proposal before developing a proposed project.

Some municipalities can enact implementing legislation even though the states in which they are located have not enacted implementing legislation (Chicago authorised a PPP for the Chicago Skyway toll road at a time when the state of Illinois did not have enabling PPP legislation).

Update and trends

Recent trends in project finance: buying and selling distressed projects
There has been an increase in M&A activity with respect to project financed assets, especially in the energy sector. Buying and selling a discrete asset that has been project financed presents a number of legal and business challenges that differentiate project finance M&A from traditional M&A. There are a number of factors driving this trend. For instance, many projects change hands after achieving commercial operation following construction; this is especially the case in the renewable energy sector where an initial developer may seek to monetise its investment and quickly turn over capital to invest in new development projects, rather than holding the project for longer term cash flows. However, project finance M&A is also driven by the need for restructuring a project's debt obligations when a project is unable to achieve its financial projections after achieving commercial operation because of design, technical or operational flaws that need to be corrected. In these circumstances, a project sponsor without an ongoing guarantee obligation may not be motivated to invest sufficient capital in the project to rectify the technical issues affecting the project's ability to perform at a level where debt service can be met. Often, a new project sponsor may emerge who, unlike the initial sponsor, is willing to invest new capital in the project in return for concessions from the lender to restructure the debt.

Seller's perspective
Although the project lender may have no financial recourse to the project sponsor, many project sponsors are simply unwilling to sell their interest in a project in a restructuring scenario without mitigating liabilities for claims that could be asserted by the new owner, the lender or a project's trade creditors if the project were to fail. To minimise these risks, sellers are reluctant to indemnify the new owner for any liabilities relating to the project, including for breaches of representations and warranties made in a purchase and sale agreement. In addition, sellers also seek a complete and general release of claims from the lender. Beyond these legal tools for allocating risk, a seller may also take an interest in analysing and receiving evidence of the projections and operating plans developed by the lender and the new buyer. While projections do not ensure success, a seller may take comfort that a project is more likely to succeed (and thereby less likely to result in post-closing disputes) if it is anticipated that the project will be well capitalised and skillfully operated on a post-closing basis.

Buyer's perspective
A buyer acquiring a project financed asset will need to balance the amount of due diligence it can reasonably conduct against a seller's reluctance to provide meaningful representations and warranties about the asset in a purchase and sale agreement. Any purchase price consideration payable to the seller will need to be analysed against anticipated returns from the project after investing additional capital into the project and after negotiating with the lender over the extent to which the lender will be able to recoup any foregone interest or principal as part of a debt restructuring from future project cash flows. In addition, a new buyer will need to be comfortable not only with the economic terms of the restructured project debt, but also that it can operate within the strict debt covenants and cash management waterfall that govern the overall project.

Lender's perspective
In many projects, a sale of the project equity to a new owner is a change of control that requires the lender's approval. In consenting to a change of control, the lender will need to be assured of the new owner's commitment to the project and that equity capital is not only available, but committed to be invested in the project. To the extent that new capital is required to be invested in the project for construction, repair or maintenance of critical infrastructure and equipment over which the lender has security, the lender will expect to receive protections commonly used in a project financing: approving material contracts, protecting the project cash flows against cost overruns, obtaining collateral assignment over material contracts along with meaningful step-in and consent rights.

28 PPP – limitations

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

The primary limitation on PPP transactions in the United States is the variation in legislation among the 50 states as well as at the local government level within each state. Lack of uniform legislation could cost a sponsor significant time and effort when putting together proposals and fund sources. Further, not every state has legislation conducive to PPP investment.

Two notable failed transactions highlight the current practical and legal limitations of PPP transactions. The Pennsylvania Turnpike is an example where the State of Pennsylvania initiated a bid process before passing enabling legislation. After the winning sponsor expended significant resources preparing its bid, the governor was unable to convince the state legislature to dismantle the state's Turnpike Authority in order to lease the Pennsylvania Turnpike to the winning sponsor. Without enabling legislation, the sponsor allowed its bid to expire.

A proposed PPP that would have privatised operation and development of Chicago's Midway Airport is an example of the financial markets stopping a transaction rather than the lack of enabling legislation. Ultimately the sponsor could not obtain financing for its bid and forfeited its deposit.

In addition to the risk that the legislative process poses, there is an ongoing risk in US PPP transactions that the applicable government entity will not appropriate funds annually over the duration of the transaction. Many states have general limitations on the long-term debt they may incur, and one legislature typically cannot bind future legislatures to financial commitments beyond a current budget cycle. Hence the budgetary process creates a degree of political risk for many US PPP transactions. The I-595 toll road in Florida is notable as the first PPP transaction in the United States to offer availability payments made by the government instead of relying on toll collections. As a result, the state's payment obligations to the project sponsor are still subject to the appropriation of funds by the state legislature.

PPP roadway projects funded by toll revenues face the risk that such revenues will be lower than forecast, resulting in reduced returns for private investors. The South Bay Expressway, a PPP roadway project in Southern California, filed for bankruptcy in 2010 after toll revenues (upon which private investors relied to finance the project) failed to meet projections. The roadway opened just as the subprime mortgage crisis hit the US, causing ridership and toll collection to fall short of projections.

The potential for future projects to compete with PPPs, particularly roadway PPPs with financial projections based on toll revenues, can also limit project development. Competition can reduce the collection of user fees, decreasing a project's returns. Some public agencies have agreed to non-compete clauses in roadway PPP agreements that prevent the public agency from building competing projects, or compensate the PPP developer for certain losses.

Furthermore, PPPs face the risk of litigation, particularly for the first PPP executed under a given enabling statute. Such litigation may cause delays in executing the PPP contract, arraigning project financing and constructing the project, and lead to an overall higher cost of borrowing generally. The Presidio Parkway/Doyle Drive Project in San Francisco was delayed by litigation challenging the project's implementation under a new California enabling law. In the case of the Presidio Parkway/Doyle Drive Project, although building and trade union labour is being used in the construction of the project, the litigation challenge was mounted by the engineers' union that was concerned over the use of private contractors rather than state workers for their portion of the work. Litigation challenges to a PPP project, like any infrastructure project, can come from a variety of involved stakeholders, including politicians who may seek to repeal enabling legislation, or local governments and non-governmental organisations who may challenge the environmental reviews or other permitting requirements applicable to a project.

A lack of institutional knowledge within government limits the ability of local and state agencies to work with the private sector to successfully structure and promote PPPs. This problem is particularly acute as political administrations (and their emphasis on PPPs) change during the course of multi-phase projects. Some states are working to address this problem by creating state offices focused on promoting the development of PPPs. For example, Virginia created the Office of Transportation Public Private Partnerships (OTPPP) in late 2010: the office currently has a pipeline of 10 candidate projects, eight projects in progress and three completed projects across the state. OTPPP's successful projects include the 495 Express Lanes project and the Pocahontas Parkway project. The office is working to develop these projects as PPPs and to build support for future projects.

The cost of borrowing money in the US 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 have been and will continue to be faced with the challenge of demonstrating that the cost-saving aspects of PPPs outweigh higher borrowing costs by emphasising that PPPs are structured to provide long-term cost certainty to public entities while shifting the risk of increased costs to the private partner.

PPP agreements may take longer to negotiate than traditional transactions due to negotiation of provisions allocating risk, particularly for the first PPP developed under a new enabling statute, which can lead to higher costs and make PPPs less attractive. These higher up-front costs should be reduced as proponents gain experience working with each PPP enabling statute and as governments create offices with institutional knowledge of PPP transactions.

These challenges may mean that smaller transactions will dominate for at least the near future, as they can be funded entirely with equity and therefore withstand shifts in the financial markets. However, as precedent for PPPs is established and litigation risk related to such projects decreases, upfront transaction costs should become more predictable and the line between a traditional project financing and a PPP project will become less stark. To avoid the risk of spending significant amounts on bids for projects not currently authorised by statute, investors may require that authorising legislation be enacted prior to engaging in a bidding process. Furthermore, the lack of universal authorising legislation may encourage investors to make unsolicited bids to local governments while encouraging those local governments to enact legislation allowing for the proposed project. The potential for future projects to compete with PPPs, particularly roadway PPPs with financial projections based on toll revenues, can also limit project development. Competition can reduce the collection of user fees, decreasing a project's returns. Some public agencies have agreed to non-compete clauses in roadway PPP agreements that prevent the public agency from building competing projects, or that compensate the PPP developer for certain losses.

29 PPP – transactions

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

Some of the more recent significant PPP transactions completed in the United States include the Chicago Skyway, Indiana Toll Road, I-495 Capital Beltway HOT Lanes, the Eagle Commuter Rail Project in Colorado, the I-595 toll road and the Port of Miami Tunnel in Florida, the LBJ Express, North Tarrant Express and SH-130 road projects in Texas, the Midtown Tunnel project in Virginia and the Presidio Parkway/Doyle Drive Project and the Long Beach Courthouse Building in California. In the first half of 2013, the extension of SR-91 in southern California reached financial close and Texas continued its roadway development programme, reaching commercial close on the I-35E Managed Lanes Project.

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