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1. Project Finance Panorama

1.1 Recent Trends and Development

Project financing remained very robust in 2018 and the first part of 2019, and this is expected to continue. The United States project financing market has been very liquid in 2018 and 2019, with capital continuing to look for solid credit and well-structured deals. The influx of an unprecedented amount of private capital into the project finance debt market kept the terms very competitive which, in turn, resulted in significant downward pressure on the pricing as well as other terms. We are seeing longer amortisation periods, lower debt-to-equity requirements (or a significant amount of such equity being increasingly financed with mezzanine debt), lower debt service coverage ratios and overall increased covenant flexibility.

In terms of the industries, there is a lot of activity in the LNG space (which, given the capital requirements of these projects, accounts for the lion's share of recent US project financings based on principal amount raised) and continued interest from capital providers in renewable projects (given their contracted revenues) – with financings of portfolios of solar assets having been completed in the private placement market for the first time. This trend is expected to continue into 2020. There have also been a lot of refinancings and repricings of existing project debt to lower the coupon as well as acquisition financing of power assets (both conventional and renewable).

In terms of types of debt instruments, the borrowers/issuers are continuing to look for capital with fixed interest rates and longer tenors, as can be found in the project bond and private placement markets. These markets are, however, still limited to more seasoned issuers with investment grade offtakers and revenue streams and no or limited construction risk.

Like the broader lending community, project finance lenders have been focused on LIBOR transition but such considerations have not raised any practical implications for project financings which, by their nature, require longer tenors.

1.2 Sponsors and Lenders

Within the United States, project sponsors vary by industry. In nascent industries, such as the US LNG market, project sponsors are often private equity-backed companies before accumulating enough capital and attracting investment from the capital markets. By contrast, in more mature power and petrochemical industries, the sponsors are typically more established companies focused on longer-term development, with a reputation for having years and even decades of experience.

As with sponsors, lenders may vary by project and, more specifically, by the stage of development of such project. Construction financing is typically provided by commercial banks, which, in the case of renewable energy projects, may take the form of tax equity investments that benefit from tax credits available in the US market. Such financings often include a conversion from construction financing to a (typically five-year) term loan upon the project achieving commercial operation. In operational projects, in addition to term loan financing from commercial banks, which is often limited to a seven-year term, debt financing from insurance companies and pension funds is available through project bond offerings, with terms ranging from ten to 25 years.

Financing sources active in project finance markets in the US include commercial banks, institutional investors and insurance companies, as well as private debt and infrastructure funds.

1.3 Public-Private Partnership Transactions

Project developers and investors have been very optimistic about the Public-Private Partnership (PPP) model being used more extensively in the US. More projects are being developed and financed using this model, such as airports, toll roads and social infrastructure assets.

There is a great amount of variety in PPP-enabling statutes in the US, so requirements applicable to procurement, licensing, authorisations and, most importantly, the definition of eligible PPP projects and investors may vary significantly from state to state. Certain states and federal agencies (such as the US Department of Transportation) have additional regulations and requirements depending on the type of the potential project.

1.4 Structuring the Deal

Construction Financing

In the case of a construction financing, the main issues in the deal relate to achieving completion at an operational level with sufficient revenues to service the debt, thereby reducing refinancing risk. Construction lenders will seek a lump sum, turnkey ("LSTK") construction contract. In addition, lenders may seek completion guarantees or additional credit support from project sponsors, although such support is becoming less common in the United States in traditional power project financings (where lenders and their engineers are familiar and comfortable with technology and construction risks) as well as renewable project financings (which feature significantly shorter construction periods and more mature/established technology). Even in the case of large-scale petrochemical and LNG projects, financings have been signed without such LSTK contracts or credit support from an established creditworthy sponsor. As indicated above, the lending markets have been borrower-friendly over the past year, and banks have been getting increasingly comfortable with alternative and less direct ways of mitigating construction risk, such as additional reserves to address potential cost increases and project delay risks. In the absence of more

traditional protections in construction financings, such as LSTK construction contracts and sponsor completion support, lenders should consider appropriate conditions to each draw under the loan facility that will ensure the project is being constructed in accordance with contractual requirements as well as the base case construction budget and schedule. When carrying out diligence on the construction contracts, in the absence of a true LSTK construction contract, lenders should also look to ensure that there are minimum production requirements that the contractor must achieve at its own cost and expense, and that any liquidated damages are appropriately sized.

Financing of Operational Projects

In the case of operational project financings, lenders will focus on key supply and offtake contracts as well as O&M arrangements. Lenders will seek covenants and events of default associated with the amendment, modification or termination of such contracts and the solvency of the counterparties thereto. Furthermore, lenders will request direct agreements with such counterparties, which typically include restrictions on such counterparties' modifications to or termination of the relevant agreement, and also provide lenders with cure and step in rights, in the event of the borrower defaulting or otherwise failing to perform its obligations under such agreement. Additionally, lenders will seek protections around changes of control, with sponsors often negotiating appropriate thresholds to permit some sell down of their interest.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

In a typical project financing in the United States, the security package will usually consist of (i) equity interests in the borrower pledged by the borrower's direct parent, and (ii) all assets of the borrower and its subsidiaries, if any (inclusive of project contracts and rights in real property).

Equity Interests

The pledge of equity interests in the borrower is granted to the lenders, pursuant to a pledge agreement executed by the borrower's direct parent(s) (referred to as the "pledgor"). If the pledgor's interest in the borrower is represented by certificates (which is often recommended for project financings of US entities), the lenders' security interest is perfected by the delivery to, and subsequent possession of the certificates by, the lenders or their agent. If the equity interests are not certificated, the security interest is perfected by the filing of notice (a UCC-1 financing statement) with the central filing office of the state in which the pledgor is incorporated.

Other Property

A security interest in the assets of the borrower is granted pursuant to a security agreement (for personal property) or a mortgage or deed of trust (for real property). The grant is perfected by a variety of methods, depending on the nature of the assets. In the case of personal property, lenders file an "all assets" UCC-1 financing statement with the state in which the borrower is incorporated. For bank accounts, lenders perfect their security interest through control over such account; such control is typically implemented through a separate depositary agreement or account control agreement, pursuant to which (i) the borrower grants a security interest in that account (together with the money and securities credited to that account) to the lenders, and (ii) the bank where the account is established agrees to follow instructions from such lenders with respect to the disposition of funds in that account without the consent of the borrower.

Please note that, in the case of real property, requirements relating to the form of the mortgage as well as filing (or recordation) of the mortgage vary from state to state. Generally speaking, any filing of a security interest in real property will need to be recorded with the local county or subdivision in which the property is located.

As a practical matter, for ease of administering the collateral and in some cases to meet the local law requirements, lenders appoint an agent (a collateral agent or security trustee) to act on their behalf. The security interest in the collateral is granted to the collateral agent, as is any control over collateral deposit accounts. The collateral agent will also hold any possessory collateral (ie, certificated equity interests pledged under the pledge agreement).

2.2 Charges or Interest over All Present and Future Assets of a Company

It is common practice in project financings in the United States for borrowers to grant security interests in all of their assets. This includes assets owned at the time of the grant as well as future or after-acquired assets of the borrower. In the case of real property, the credit agreements include covenants requiring a borrower to add any after-acquired collateral to the collateral description in the mortgage, thereby extending the security interest to such new property.

There are several classes of assets that are customarily excluded from the scope of the lenders' security interest. Assets are commonly excluded from the grant due to regulatory restrictions or because the grant of the security interest in those assets would cause a potentially undesirable result. For example, there are statutory limitations and restrictions on security interests in the following: margin stock, governmental licences and certain intellectual property interests, and contracts to the extent the security interest or assignment would result in a default under or termination of such contract (underscoring the importance of direct agreements with project counterparties, so that the counterparties acknowledge and consent to such security interest). That said, even though the grant of a security interest will

almost always have some exclusions, an "all assets" filing will still operate to perfect the security interest in the personal property assets that are part of the collateral package – it is permissible for the language on the filed financing statement to be broader than in the security documents.

2.3 Registering Collateral Security Interests

Aside from transaction costs associated with drafting the security documents, direct agreements and notices associated with the grant and perfection of security interests, the only applicable costs are recording costs. The filing of financing statements and mortgages will incur fees by the relevant offices, though such fees for personal property filings are typically not significant. In some local subdivisions within the United States, taxes may be required upon the recording of mortgages on real property, which could be significant if they are based on the amount of the loan secured by such mortgage. It is advisable to have this discussion with local counsel early on in the structuring of the financing transaction.

2.4 Granting a Valid Security Interest

In the United States, almost all states have adopted a uniform set of laws governing commercial transactions, including financings, referred to as the uniform commercial code (or UCC). The UCC groups various types of personal property into specifically defined categories. The grant clause in a security agreement will make reference to these categories (specifying that they are as defined in the relevant state's version of the UCC). The grant clause will also include "catch all" language to cover all assets of the borrower not described by the general UCC categories or other assets that may be more specifically identified in the grant clause.

To grant a valid security interest in real property, the mortgage or the deed of trust will typically need to contain a specific legal description of real property covered by it.

2.5 Restrictions on the Grant of Security or Guarantees

From a legal perspective, generally speaking, there are minimal restrictions on grants of security interests in assets, so long as the borrower owns (or will own) the asset (as mentioned above, there are some regulatory restrictions relating to margin stock, gaming assets and other types of property commonly excluded from the security interest). In respect of guarantees, while there are no restrictions on financial assistance, consideration should be paid to the solvency of the guarantor after giving effect to the proposed guarantees and, in the case of upstream and sister-company guarantees, to ensuring that the guarantor is sufficiently benefitting from the transaction to mitigate considerations relating to fraudulent transfers (ie, the provision of assets or support without receiving value in return).

More pressing for lenders are potential contractual limitations on the creation of security or the issuance of guarantees. Through their own diligence review and also through borrower or guarantor representations, lenders will want to ensure that the organisational documents, any other financing documents and the project agreements each permit the grant of assets or guaranty. As discussed above, there are some practical exclusions from the grant of security to which lenders will typically agree, in order to avoid an unwanted result like the breach of an existing statute or contract, and to preserve the rest of the security package, but generally speaking these exclusions are customary and in most cases lenders can obtain a security interest in the primary project assets and contracts (provided the necessary consents are obtained).

2.6 Absence of Other Liens

Lenders will satisfy themselves to the priority of their liens, and the absence of other liens, through diligence and the conditions precedent included in the financing agreements. As noted above, in the case of most personal property assets, perfection is obtained by filing a financing statement with the central filing office in the state of the grantor's incorporation. Prior to the effectiveness of the financing agreements, the lenders will require satisfactory lien search results from the relevant filing offices (which will include offices where tax liens would be filed and local real property records). In the case of certificated security interests, lenders will condition the financing agreement on the physical delivery of all such certificated interests.

Additionally, the terms of the financing documents will require the borrower to make representations as to the absence of other liens, as well as to the effectiveness and priority of the liens granted to the lenders. Finally, lenders will include covenants requiring the maintenance of such liens (and permitting the lenders to take all such actions in furtherance of the same) and prohibiting the creation of any new liens other than a limited agreed set of immaterial or ordinary course liens. Ordinary course liens that would typically be permitted by a financing agreement include construction contractors' liens for payments under the construction contract; as a result, lenders in a construction loan facility will usually require the delivery of contractors' lien waivers corresponding to recently invoiced payments as a condition to borrowings.

2.7 Releasing Forms of Security

The requirements for lien releases are generally subject to two things: (i) the terms of the applicable financing agreements, and (ii) the type of collateral being released. In the case of non-possessory and non-real estate collateral, the liens are released upon the termination of the security agreement. In most financing documents, the agreements terminate automatically upon full repayment of the underlying credit facilities without need for any further documentation.

In some cases, lenders may require a notice or letter of termination for the financing documents.

Once the security interest has been released, the perfection steps are unwound. In the case of security perfected by the filing of a UCC-1, a termination statement is filed. In the case of a real property mortgage, a mortgage release is filed. In the case of possessory collateral, the collateral agent will return the certificated interests to the borrower. Finally, in the case of collateral perfected by control, the applicable control agreement will be terminated, which, as with the other financing documents, can be effective automatically or with a notice of termination.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

In a typical project financing, lenders will only have recourse against the borrower, its assets and the pledge of equity interests in the borrower. As a practical matter, lenders will use a threat of enforcement of remedies as a means of negotiating leverage in a workout or restructuring of the loan. If, indeed, lenders were to foreclose, lenders (through their agent) could proceed through judicial foreclosure and seek an order from the courts. The UCC-prescribed alternative of a foreclosure sale is more practical, at which the collateral agent can sell foreclosed-upon assets; the UCC has certain notice requirements and other restrictions outlining the procedure for any public or private foreclosure sale. In any case, following a foreclosure, the agent will be required by the financing documents to distribute the proceeds to the secured lenders, and the financing documents should contain a liquidation waterfall that outlines the order in which lenders are paid (which of course depends on the number of agents, the number of credit facilities and applicable intercreditor arrangements, if any). The financing documents (including direct agreements with project counterparties) should anticipate these alternative means of foreclosure even though, as mentioned above, foreclosure is not necessarily a desirable result for the lenders and their agent, who more often would like to restructure the debt in a way that allows the debt to get serviced and repaid.

3.2 Foreign Law

Federal and state courts in the US generally recognise freedom of contract and thus respect sophisticated parties' choice of governing law and venue. However, as a practical matter and as outlined in more detail in **9 Applicable Law**, it is much more common in the financing of US-based projects for the financing documents to be governed by New York law (with applicable state law governing financing agreements relating to real property interests).

3.3 Judgments of Foreign Courts

Federal and state courts in the US generally recognise foreign judgments and awards, although the US is not party to any binding treaties requiring this. Using New York as an example, the general policy of New York courts is to recognise and enforce foreign judgments, unless some basic principle of due process or public policy is violated. New York courts will typically wait (and stay proceedings where applicable) if the foreign judgment is not final – that is, the judgment is still undergoing appeal.

3.4 A Foreign Lender's Ability to Enforce

Lenders should not expect to encounter serious difficulties in enforcing monetary awards from a reputable tribunal. Certain US states may require a lender enforcing on collateral to be licensed/authorised to carry out activities in such state. That said, for practical reasons discussed elsewhere, any difficulties in enforcement can be mitigated with the choice of New York (or another US state's) law and with the selection of a US-based collateral agent.

4. Foreign Investment

4.1 Restrictions on Foreign Lenders Granting Loans

There are no blanket restrictions on foreign lenders providing loans to US-based borrowers; any restrictions would be lender-specific. In other words, lenders who have been identified and sanctioned by the United States government, or have otherwise been found to be in violation of applicable anti-bribery, anti-corruption and anti-terrorism laws, would typically not be part of the syndicated project financing loan facility due to restrictions on dealing with such lender, which would apply to the borrower and agent. Ongoing lending activities in the US may trigger certain banking licensing requirements.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

Similarly to the above question, there are no blanket restrictions under federal or state laws on granting a security interest to foreign lenders. Unsurprisingly, borrowers will be subject to the same restrictions and potential liability discussed above if they are found to be granting collateral to foreign lenders that are in violation of relevant US sanctions or anti-corruption laws.

While it is thus permissible for a wide range of foreign lenders to lend to and benefit from the collateral package offered by any US project, there are certain practical considerations that operate to incentivise lenders to appoint a collateral agent that is a US entity (or at least is a US-based branch of a foreign bank). For one thing, the burden of administering foreclosure is administratively simpler if the agent is located in the US (and, more particularly, in the state whose law governs the security agreement), in that a locally organised collateral agent will be better positioned to oversee any foreclosure sale of project assets (or to foreclose on the equity and

sell those interests to another entity), or to participate in any judicial proceeding for foreclosure (which for obvious reasons is less preferable to a foreclosure sale, which the UCC permits). For another thing, in the US, where it is customary for borrower's counsel to provide legal opinions, if the agent and depositary bank are located in the state whose law governs the security agreement and any certificated securities are delivered at closing in that state, borrower's counsel will be able to provide opinions as to the enforceability of financing and security agreements, and as to the valid and perfected grant of security without undesirable qualifications. While these practical implications should influence the selection of the collateral agent, they do not limit any foreign lender's ability to share in the proceeds of any foreclosure – a standard financing agreement will still provide for the collateral agent, following foreclosure, to distribute proceeds pari passu to the senior creditors.

4.3 Foreign Investment Regime

There is no specific requirement that would apply to non-US lenders advancing loans to US borrowers, but in certain cases such activity may require a banking licence/authorisation.

4.4 Restrictions on Payments Abroad or Repatriation of Capital

There are no blanket restrictions that would apply to lenders of project finance loans.

4.5 Offshore Foreign Currency Accounts

There are no general restrictions under applicable US laws that would restrict offshore foreign currency accounts. However, as a practical matter, the use of such accounts in US project financings is exceptionally rare. Borrowers in such financings have no use for such accounts and therefore would generally not request to hold such accounts and, if they did, lenders would likely reject such a request.

5. Structuring and Documentation Considerations

5.1 Registering or Filing Financing of Project Agreements

The need to publicly file financing or project agreements is generally dependent on federal and state securities laws, which revolve around disclosure, and in turn on whether the borrower is a public company and on the nature of the financing itself. If the borrower is a publicly traded company, the US Securities and Exchange Commission (the federal government's regulator of securities laws and securities exchanges) requires it to make certain disclosures, including fulsome periodic reports on the business and financial condition of the company, and the occurrence of certain non-ordinary course events. The incurrence of a new material debt facility will need to be disclosed, as will the company's material contracts. For a project company (or the holding company of a project company) that is publicly traded, this will mean that its primary construction, offtake and supply contracts will be publicly available, as will its loan agreements and indentures. In some circumstances, it is permissible for sensitive information to be redacted in the publicly disclosed agreements. For example, in the LNG space, some US-based project sponsors have been able to redact the contract pricing formulas from their publicly disclosed sale and purchase agreements, so as not to upset any competitive advantage available to those sponsors' projects. If a project sponsor is not publicly traded, or if it owns a substantial portfolio of businesses and projects, it will not have to make disclosures that are as specific or granular. Smaller, privately held companies will not be subject to federal and state securities' disclosure requirements, unless they have raised financing in the public debt market. Larger, robust project sponsors may be so big that their individual projects are less of a material concern for the company, and thus the sponsor can plausibly disclose its financial statements on a consolidated basis or speak in generalities about its projects in its periodic reporting. Consequently, disclosure requirements in the US are generally keyed towards the borrower's status; creditors like banks and insurance companies based in the US are also federally regulated and subject to their own disclosure requirements, but those will not typically require fulsome disclosure of individual loans or debt transactions.

US securities laws also impose disclosure requirements in case of any project financing raised in the capital markets. For example, issuers of project bonds will generally seek to qualify the issuance for either the private placement exemption under Section 4(a)(2) of the Securities Act of 1933 or the safe harbour for resale of securities available under Rule 144A of the Securities Act of 1933, which are less time-consuming than registered offerings, which have to meet specific disclosure requirements and undergo an SEC review process. Both of the above exemptions from US registration requirements have certain conditions that must be met, including the size and sophistication of the investors to whom the sponsors can offer the project bonds. It should be noted that the pool of investors in a Rule 144A-eligible transaction is generally larger than the pool of investors who can participate in a 4(a)(2) private placement, and for this reason Rule 144A transactions are generally perceived as being more favourable to foreign-based sponsors who are seeking access to the US capital markets. Additionally, where creditors are located outside of the US, there is a safe harbour available under Regulation S, which provides an exclusion for offers, and sales of project bonds outside of the US. Bond offerings seeking to qualify for the safe harbour are thus frequently structured as combination Rule 144A/Reg S offerings to increase liquidity. However, it should be noted that the inherently more liquid nature of a Rule 144A/Reg S offering requires a significantly more wide-ranging offering circular than a 4(a)(2) private placement, which discusses the key terms of the bonds and the material project docu-

ments in great detail. The investment banks that act as the initial purchasers of the bonds and resell the bonds to the ultimate investors may be subject to potential liability under federal and state antifraud rules on the content of the offering circular, and counsel will usually be required to issue a "negative assurances" letter to the effect that there is no reason to believe the disclosures in the offering circular contain an untrue statement or omission of material fact.

Changing topics, one finance document that is typically filed regardless of the financing structure is any mortgage on the real property owned or leased by the relevant borrower. Mortgages (or shorter form versions of the mortgage) are typically filed publicly so that any potential future creditors are on notice of the mortgaged interest. Similarly, with respect to personal property, UCC financing statements are also publicly filed, though these also serve a notice function and can contain the generic "all assets" designation rather than a more detailed description of the collateral.

5.2 Licence Requirements

Practically every project financed in the US will require permits in order to be constructed and eventually enter into operation. What permits are required, and the entity that is responsible for obtaining them, depend on the stage of development, construction or operation of the relevant project, on the governmental entity with jurisdiction, and on where the project is located. For example, a project under construction will require a different series of permits than a project in operation, to manage the siting and excavation work required, and a financeable construction contract will have a clear delineation of which permits each entity (as between the contractor and the borrower) is responsible for obtaining. Each level of government in the US (from the municipality to the state to the federal government) can require the project to obtain certain permits. At the municipal level, these requirements are often a function of the project's and the sponsor's relationship with local political leaders; as an example, a project may be required to build local improvements that benefit the community as a condition to obtaining permission to build in a certain area. At the state and federal level, a project's location can dictate the permits it needs to obtain; for example, various state and federal regulatory agencies have oversight over the manner of a project's construction and operation if it is located on regulated land or near important waterways.

In many cases, permits will be obtained in the borrower's name. In circumstances where the lenders or their agent foreclose directly on the equity in the borrower, the entity to whom the permit is granted will not change, and the foreclosure should not affect the permit itself unless it contains restrictions on change of control. Where the permit is granted to the sponsor or another affiliate of the borrower, in the event of a foreclosure the permit will likely need to be transferred. Of course, depending on the level of government at which the relevant permit is obtained, and especially at the state and municipal level, where many permits are granted, there is greater variation in permitting requirements, and lenders should engage local counsel with expertise in those jurisdictions who can advise on the potential ramifications in the case of foreclosure.

5.3 Agent and Trust Concepts

As highlighted in other responses, agency and trust concepts are not only recognised in the US, but are also recommended for any large-scale project financing, especially ones that involve foreign lenders. The agency roles are useful in centralising decision-making among the creditors, which is necessary for any syndicated financing or for projects where there are multiple facilities of senior creditors, and for perfecting the senior creditors' security interests in a manner that ensures their first-priority position (as discussed in more detail in **5.4 Competing Security Interests**). The agent will often be appointed by the lenders in the financing agreement itself, and therein authorised to enter into the relevant security documentation; in financings with multiple senior debt facilities, the agent will be appointed in the intercreditor agreement or some other agreement to which the senior creditors' representatives are party. In single-lender financings, the lender can outsource the agency roles to an institution that is more experienced in handling agency-related matters, though more often the sole lender will act as its own agent and hold physical collateral within its own vault (and thus save on fees that would be payable to any agent to whom it could have outsourced the agency role).

Trusts have been more widely used in multiple-lien financings that involve possessory collateral, which the trustee can hold for the benefit of beneficiaries of the senior trust as well as the junior trust, subject to the recovery waterfall and other subordination terms.

5.4 Competing Security Interests

Priority rules with respect to competing security interests in personal property are governed by Article 9 of the UCC in effect in the applicable state whose law governs the security agreement. As mentioned above, the UCC will generally define several specific types of collateral, and the UCC's priority rules can differ depending on the type of collateral in which the security interest is granted. The UCC's default rule with respect to most types of collateral is that the security interest therein can be perfected by filing, and where there are two creditors who have filed a financing statement covering the same collateral against a particular borrower, the creditor who filed first is determined to have priority over the creditor who filed later.

As discussed above, with respect to certain types of collateral, there are alternative means of perfection recognised (and in limited cases required) by the UCC. Most importantly for project lenders, there are different priority rules governing

certificated securities (which includes equity certificates that are properly labelled), letters of credit and bank accounts that are deemed securities accounts or deposit accounts. For certificated securities, lenders whose security interest is perfected by possession will have priority over lenders whose security interest is perfected by filing – for this reason, where equity in the borrower is pledged, the certificated securities are often handed over to the lenders or their agent at closing. Similarly, where lenders and their agent have a perfected security interest in letters of credit and/or bank accounts by means of "control" (meaning, basically, that the collateral agent or depositary bank, as applicable, has the authority to direct how those assets are maintained or disposed of upon foreclosure), they will have priority in that collateral over other lenders. In fact, it is not even possible to perfect an interest in a deposit account by filing, meaning the agent must enter into a control agreement governing those accounts.

Subordination and priority rules can also be contractually negotiated, and it is common for different classes of creditors in a given project to agree to some sort of subordination agreement. The initial lenders to a given project will typically seek to limit the amount of additional debt that the borrower can incur, and often seek to impose further conditions that limit the terms of any such additional debt. For example, lenders (especially those who are anticipating being refinanced eventually) may agree to allow the borrower to incur a certain amount of replacement debt that shares pari passu in the collateral, so long as both the historic and projected debt service coverage ratios are not lower as a result of the incurrence and the tenor of the new debt is longer than the initial debt being replaced, among other conditions. Lenders may also permit a larger amount of subordinated debt to be incurred, assuming the junior lenders enter into a subordination agreement on terms that are satisfactory to the senior lenders. Subordinated lenders are usually willing to enter into such an arrangement in exchange for higher interest rates commensurate with the greater risk that corresponds to their junior position. Subordination agreements are generally recognised in bankruptcy proceedings in accordance with the mechanics of the code, as discussed in more detail in **6. Bankruptcy and Insolvency**.

5.5 Local Law Requirements

There is no general requirement for a project company to be organised under the laws of any particular jurisdiction in order to borrow funds, though of course there are practical realities that incentivise the formation of any particular borrower and the jurisdiction in which it was formed. For reasons that are integral to typical US project finance transactions, project company borrowers are special purpose entities whose assets are generally limited to the project contracts, the physical components of the project itself, any owned or licensed intellectual property, and any owned or leased real property. These special purpose entities typically take the form of limited liability companies or limited partnerships, which are structured in accordance with state laws and serve as pass-through entities for tax purposes, to avoid the "double-taxation" problem that affects corporations (who are taxed on their profits and whose dividends paid are taxable in the hands of shareholders). It is common for borrowers to be formed under Delaware law, which has a robust and well-tested set of rules regarding the governance of limited liability companies and limited partnerships.

6. Bankruptcy and Insolvency

6.1 Company Reorganisation Procedures

In the United States, company insolvency and reorganisation is governed by federal law under title 11 of the United States Code (the "Bankruptcy Code"). The Federal Rules of Bankruptcy Procedure govern procedures in all US bankruptcy cases. Each bankruptcy court also has local rules that supplement those federal rules. Bankruptcy courts generally have exclusive jurisdiction to hear and determine all "core" bankruptcy matters – issues that arise under the Bankruptcy Code or that arise in a bankruptcy case. As such, bankruptcy courts cannot enter final orders on "non-core" matters – issues that are merely related to a bankruptcy case – without the consent of all relevant parties.

While various types of bankruptcy cases exist under the Bankruptcy Code (generally speaking, Chapter 7 governs liquidations where a trustee is appointed by the court to sell assets and distribute the proceeds to creditors; Chapter 9 governs reorganisations for municipalities; Chapter 11 governs company reorganisations; Chapter 12 governs farmer or fisherman reorganisations; Chapter 13 governs reorganisations of individuals; and Chapter 15 governs insolvency of foreign companies with US debt), Chapter 11 has become a popular tool used by entities to reorganise businesses and preserve going-concern value while continuing operations.

The United States Supreme Court has held that "*the fundamental purpose of reorganisation is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuses of economic resources*" (NRLB v. Bildisco & Bildisco, 465 US 513, 529 (1984)). A Chapter 11 debtor's goal generally is to reorganise its balance sheet, modify cost structures and get a "fresh start" through a plan of reorganisation (the "Plan"), which must ultimately be confirmed by the bankruptcy court.

The Plan is a result of debtor-driven negotiation among key constituencies in the Chapter 11 case (ie, creditors' committee, ad hoc bondholder groups, etc). The debtor has the exclusive right to file the Plan during the first 120 days of the Chapter 11 case. This period may be extended by the bankruptcy court, but cannot be extended beyond 18 months from the commencement of the Chapter 11 case. A party-

in-interest (ie, a creditor) may seek to shorten this exclusivity period by filing a motion to show cause. The Plan must include a classification of all claims, and must specify how each class of claims will be treated under the plan. The Plan must afford equal treatment to all similarly situated creditors and must be feasible – ie, not likely to result in further reorganisation or liquidation. Each class of creditors entitled to vote must approve the Plan before the bankruptcy court can confirm the Plan. The confirmation process typically follows the following steps:

- the Chapter 11 debtor files the Plan and disclosure statement (a document that includes sufficient information concerning the assets, liabilities and business affairs of the debtor to allow a creditor to make an informed judgement on the Plan);
- the bankruptcy court holds a hearing to approve the disclosure statement, and the vote solicitation process commences (28 days' notice is required);
- the disclosure statement, plan or reorganisation, ballots and other court-approved solicitation materials are sent to creditors;
- votes are tallied – to approve a Plan, each class entitled to vote must vote in favour either by a majority of number of claims actually voted, or by two-thirds in the amount of claims actually voted;
- a confirmation hearing is held for the bankruptcy court approval of the Plan; and
- emergence from bankruptcy wherein claims are discharged and the transactions close (exit financing obtained, rights offering, etc).

6.2 Impact of Insolvency Process

As soon as an entity files for relief under the Bankruptcy Code, the automatic stay applies (11 USC. § 362). The automatic stay is the primary debtor protection tool and prevents other parties (including creditors) from taking any action adverse to the debtor's estate related to pre-petition claims (claims that arose before the debtor filed for Chapter 11 relief). The automatic stay would therefore prevent a lender from enforcing its loan or foreclosing on or taking collateral where the borrower has filed for protection under the Bankruptcy Code. The automatic stay is not absolute, and a creditor may seek to lift it by filing a motion with the bankruptcy court demonstrating cause. Common grounds for relief from the automatic stay include the following:

- the creditor has a security (or similar) interest in the asset of the debtor and that asset is at risk of loss or depreciation to the creditor's detriment (lack of adequate protection);
- the debtor filed for bankruptcy in bad faith; and
- the creditor has a security interest in the debtor's asset and the debtor has no equity in the asset above the amount of the debt secured and the asset is not necessary for the debtor's reorganisation.

However, it is generally difficult to obtain relief from the automatic stay in a Chapter 11 case where the debtor is making progress toward a viable reorganisation strategy and is managing assets responsibly.

6.3 Priority of Creditors

The Bankruptcy Code governs the order in which claims are paid, which is referred to as priority. Post-petition liabilities (claims arising after the entity has filed for bankruptcy under the Bankruptcy Code) have priority over pre-petition liabilities (claims arising before the bankruptcy filing). Generally, claims are paid in the following order:

Post-petition liabilities:

- Carve-Out Claims – these include those claims agreed upon by the secured lenders for the benefit of the debtor and creditor committee professionals.
- Senior DIP/Secured Claims – if a debtor lacks sufficient funds at the time of the Chapter 11 filing, it is entitled to borrow funds (Debtor-in-Possession ("DIP") financing) at the outset of the case. The debtor may prime an existing secured lender if necessary to obtain DIP financing, or may offer liens on unencumbered property to induce lenders to provide DIP financing.
- Subordinated DIP/Secured Claims.
- Superpriority Claims – superpriority status can be granted to a creditor if (i) the creditor has an allowable claim in the bankruptcy proceeding; (ii) the claim arose from either (a) the use, lease or sale of property, (b) a lien that was granted, or (c) a stay of action which was granted; and (iii) adequate protection was provided.
- Administrative Claims – these include those claims for costs associated with preserving the estate throughout the bankruptcy process (ie, costs of professionals). Administrative claims must be paid in full before the debtor can exit from Chapter 11.

Pre-petition liabilities:

- Pre-petition Secured Claims (1st Lien) – holders of pre-petition secured claims have a security interest in the debtor's property.
- Pre-petition Secured Claims (2nd Lien).
- Priority Claims – there are eight additional categories of claims that are given priority by statute (11 USC. § 507). These claims include pre-petition wage claims, taxes, customs duties and contributions to employee benefit plans.
- General Unsecured Claims – holders of a general unsecured claim are those claimants with no security interest in property. These claims include contingent or unliquidated claims (ie, lawsuits or indemnities).
- Subordinated Claims/Equity Interests – subordinated claims are those claims subordinated by contract, by equitable subordination. Holders of common stock or

membership interests in the debtor share pari passu with holders of subordinated claims.

6.4 Risk Areas for Lenders
Creditors should be aware of the following risks associated with a borrower, security provider or guarantor becoming insolvent (this is not an exhaustive list):

- Automatic Stay – the automatic stay represents the most significant risk to creditors, and prevents them from taking any further action to collect against property owned by the debtor or from the debtor itself. The creditor is prohibited from pursuing court action against the debtor; enforcing a judgment already obtained; imposing or enforcing a lien against the debtor's property; or repossessing or selling the debtor's assets.
- Insufficient Proceeds from Sale of Collateral in Liquidation – in the Chapter 7 liquidation context, assets are often sold at a significant discount. As such, cash obtained from the sale of collateral in liquidation may be insufficient to cover a lender's outstanding debt, making it impossible for the debtor to make the lender whole.
- Impact on Contractual Rights – under the Bankruptcy Code, the debtor has the right to assume, assume and assign, or reject executory contracts (ie, those contracts where substantial performance is required on both sides as of the petition date) (11 USC. § 365). This can present a significant risk to project lenders where a few contracts (supply and offtake) are key to preserving the value of the project. In addition, the Bankruptcy Code has separate provisions relating to hedging, which should be considered in case of commodity hedging (especially on a secured basis) for the financed project.
- Risks Associated with Restructuring Plans – a debtor's Plan will often not provide for recovery in full, and once the Plan is confirmed by the bankruptcy court, it is binding on all creditors. A creditor can waive its rights by failing to object to a Plan. A Plan can also be confirmed through a "cram-down" without acceptance of all classes entitled to vote if at least one impaired class votes to accept the Plan (without counting the votes of insiders) and the Plan is fair and equitable to the rejecting classes. Furthermore, creditors should be aware that a debtor may propose a Plan under which a non-debtor guarantor of debt is released from liability. While the Bankruptcy Code does not provide for a discharge of debt of any other party other than the debtor, it is possible for creditors to accept a Plan providing for the release of a non-debtor guarantor.

6.5 Entities Excluded from Bankruptcy Proceedings
Section 109(a) of the Bankruptcy Code governs the eligibility for relief under the Bankruptcy Code (11 USC. § 109(a), and contains two basic requirements. First, the debtor must be a "person" – generally defined under the Bankruptcy Code to include any individual, partnership or corporation (for Chapter 9 cases, the debtor must be a municipality) (11 USC. § 101(41)). Second, the debtor must either be incorporated in the United States, or have a business or some property in the United States. While this is a relatively low bar for eligibility for relief under the Bankruptcy Code, there are some practical reasons why certain foreign entities may not file for bankruptcy protection in the United States (ie, lack of comity).

7. Insurance

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies
As a general matter, insurance law in the United States is a highly specialised area of law and outside the scope of a general overview of US project financing. In short, the key considerations for insuring project finance assets (and the negotiation of covenants applicable to the borrower related thereto) are the commercial availability of such policies. Project finance transactions generally include an insurance consultant specialist, who will analyse the insurance requirements of the project documents, the location and nature of the project, and general industry standards for similar projects. The consultant will then recommend the suite of minimum insurance coverage that the lenders should require. Such recommendations will consider the availability of insurance policies, and the cost (or premiums) of such insurance. As such, the relevant restrictions and fees are market driven.

7.2 Foreign Creditors
As discussed, in structuring transactions, lenders appoint agents to act on their behalf. In respect of insurance policies, such agents will be the named payees on the lenders' behalf as well. Therefore, foreign lenders in the transaction will not directly receive insurance proceeds. Instead, such proceeds will be paid to the agent and then applied to the outstanding balances (which will include pro rata payment to lenders). The only considerations for foreign lenders in such case are the tax considerations discussed below.

8. Tax

8.1 Withholding Tax
Interest, dividends and other investment income paid to non-US persons is generally subject to a federal withholding tax, at a 30% rate. However, an applicable tax treaty may lower the withholding tax rate, and exemptions may be available to eliminate the withholding tax depending on a lender's structure and activities. Additionally, certain payments to non-US entities with US owners or with accounts held by US persons may be subject to 30% withholding tax under

the Foreign Account Tax Compliance Act (FATCA), unless certain information reporting requirements are met.

8.2 Other Taxes, Duties, Charges

Choice of entity is a necessary consideration for any non-US business considering investing in the US. Among other considerations, while non-US businesses are not required to conduct their US activities through US entities, a non-US entity may nevertheless become subject to US income tax if the nature and extent of its activities are such that it is considered to be engaged in a US trade or business and has "effectively connected income" with respect to that trade or business.

8.3 Limits to the Amount of Interest Charged

In the United States, usury interest is governed by state law. In New York, there are two relevant thresholds: civil usury and criminal usury. Under New York law, charging more than 16% is civil usury and charging more than 25% is criminal usury.

While market rates are well below these thresholds, lenders should be aware of what constitutes "interest" under New York law and the drafting considerations available. In the case of loans that are not home mortgage loans, "interest" includes incentive fees, commissions and origination fees.

Common practice has evolved to include protections against usury claims in loan documentation. Every loan agreement should and will include a usury savings clause, which provides that, should the interest charged under the loan agreement exceed the statutorily permitted rate, then the agreement shall be deemed to cap the interest at the maximum rate permitted by law. In short, the purpose and effect of this clause is to automatically cap the interest charged under the loan agreement at the maximum legal rate in order to avoid the loan being deemed usurious.

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9. Applicable Law

9.1 Project Agreements

The governing law of project agreements for US projects typically depends on the type of contract at issue and the bargaining power of the project counterparty relative to the sponsor. Parties are free to select any governing law that is mutually agreeable, and New York law is a common selection, especially in cases where neither party has significantly more leverage than the other, owing to (i) a legacy of case law regarding contract interpretation that is generally regarded as being commercially reasonable and (ii) a favourable choice of law and venue rules that enable New York law to govern contracts that do not bear a direct relation to the state so long as a minimum dollar value is at stake, thus offering more predictability to counterparties. However, it is not uncommon to see project counterparties negotiate a different governing law – a construction contractor may select Texas law (which tends to be contractor-friendly), or other particularly strong counterparties may select the law of their home state. Project agreements dealing with real property, such as leases, may be required to be governed by the law of the jurisdiction of the location of such real property.

9.2 Financing Agreements

Even more so than project agreements, New York law is typically selected as the governing law for financing agreements in US project financings, for the same reasons elucidated above: New York law and courts offer predictability, experience in adjudicating financial transactions (including cross-border transactions) and clear choice of law rules, which allow the parties to apply New York law.

9.3 Domestic Laws

In US project financings, almost all matters are governed by domestic law (often New York law, plus the governing laws of the various project documents).